No. 87-107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BRENDA PATTERSON,

Petitioner,

vs.

McLEAN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT ON REARGUMENT

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QUESTION PRESENTED

Whether or not the interpretation of 42 U.S.C. §1981 adopted by this Court in Runyon v. McCrary, 427 U.S. 160 (1976), should be reconsidered.

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CITATIONS TO OPINIONS AND JUDGMENTS BELOW, JURISDICTION, AND STATUTE INVOLVED

Respondent has no objection to the Petitioner's presentation of any of these matters.

STATEMENT OF THE CASE

The Court in Runyon v. McCrary, 427 U.S. 160 (1976), held that "[42 U.S.C.] §1981 prohibits private, commercially operated, non-sectarian schools from denying admission to prospective students because they are Negroes...." 427 U.S. at 168. More broadly, however, the Court determined that "§1981 ...reaches purely private acts of racial discrimination" in the making and enforcement of private contracts. Id.

Justice White, joined by Justice Rehnquist, dissented. In their view, the plain language of §1981, its legislative history, and clear dictum in the nearly contemporaneous Civil Rights Cases, 109 U.S. 3, 16-17 (1883), all inveighed against the majority's conclusion. 427 U.S. at 192-214. They saw no prohibition in §1981 "against a private individual's or institution's refusing

to enter into a contract with another person because of that person's race." Id. at 192.

Feeling bound by earlier decisions of the Court, two other Justices concurred in the majority decision,[1] but expressed varying degrees of skepticism with its construction of §1981. Id., at 186-189 (Powell, J., concurring), 189-192 (Stevens, J., concurring).[2]

The majority treated the result in Runyon v. McCrary as virtually foreordained by

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[1] The dissenters took issue with the concurring Justices' sense of fealty. Id. at 192 n.1 (Per White, J.).

[2] Justice Powell stated that he "might well be inclined to agree with Justice White that §1981 was not intended to restrict private contractual choices," observing that "Much of the [dissent's] review of the history and purpose of this statute...is quite persuasive." Id. at 186. Justice Stevens was even more emphatic: "There is no doubt in my mind that [the majority's] construction of the statute would have amazed the legislators who voted for it," he said. Id. at 189. "Congress intended only to guarantee all citizens the same legal capacity to make and enforce contracts, to obtain, own, and convey property, and to litigate and give evidence. Id.

earlier cases. 427 U.S. at 168-169.[1/]. It began with the premise, articulated in Jones, 392 U.S. at 441-43 n. 78, that both §1981 and its companion, 42 U.S.C. §1982,[2/] derived originally from §1 of the Civil Rights Act of 1866[3/] 427 U.S. at 170. It recalled that in Jones, the Court held that the portion of the 1866 statute which was codified as §1982 prohibited private racial discrimination in the sale or rental of real or personal property. Id. This determination, it continued, was reaffirmed and broadened in Tillman, supra. Id. at 171. There, relying on Jones,

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1/ Johnson v. Railway Express Agency, 421 U.S. 454 (1975); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). The majority agreed with the court of appeals in Runyon that the "conclusion that §1981 was ... violated follows inexorably from the language of the statute, as construed in Jones, Tillman, and Johnson." 427 U.S. at 173.

2/ See App. at 7.

3/ Act of April 9, 1866, ch. 31, §1, 14 Stat. 27. See App. at 1-5.

the Court held that a private swimming club had violated §§1981 and 1982 and the Civil Rights Act of 1964,[4/] by enforcing a guest policy that discriminated against Negroes. It saw no reason to interpret §1981 and §1982 differently there in view of the "historical interrelationship" between the two provisions. 427 U.S. at 171.

Finally, in reviewing Johnson, 421 U.S. 454 (1975), the majority stated:

> [T]he Court noted that §1981 "relates primarily to racial discrimination in the making and enforcement of contracts," 421 U.S., at 459, and held unequivocally "that §1981 affords a federal remedy against discrimination in private employment on the basis of race." Id., at 459-460.

427 U.S. at 172. The Court declared that from these precedents it was "apparent" that the respondent private schools in Runyon had en-

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4/ 42 U.S.C. §2000a, et seq., (1981).

gaged in "a classic violation of §1981" by barring the black applicants. Id.

The dissent faulted the majority's analysis of the legislative history of §1981.[7] Whereas the principal opinion saw §1981 as a lineal descendant of §1 of the Civil Rights Act of 1866, as interpreted in Jones, the dissent concluded that §1981 (formerly §1977 of the Revised Statutes of 1874)[8] in fact was the literal reenactment of §16 of the Enforcement Act of 1870[9], and was not rooted in the 1866 Civil Rights Act. 427 U.S. at 206-

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[7] Unlike the dissent, the majority opinion in Runyon did not directly address whether the plain language of §1981 supported the results. Presumably, it found this task unnecessary in light of its reliance on past decisions. The dissent, of course, found no warrant for the Court's decision in the language of the Code. 427 U.S. at 193-195.

[8] Revised Statutes of the United States, 1873-'74 (U.S. Gov't. P.O., Washington D.C., 1875) at 384.

[9] Act of May 31, 1870, ch. 114, §16, 16 Stat. 140, 144.

211.[10] It laboriously traced the legislative history of §16 of the 1870 statute to show that §1981 "means what it says and no more", i.e. "that it outlaws any legal rule disabling any person from making or enforcing a contract but does not prohibit private racially motivated refusals to contract." Id. at 195. Having reached this conclusion, the dissent disputed the majority's assertion that a full examination of the meaning of §1981 was pretermitted by the three cases cited earlier.[11] 427 U.S. at 192 n.1, 213-214. Jones, it explained, was a decision construing §1982, which had a different source than §1981, and did not foreclose a determination

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[10] The majority conceded that §1977 of the Revised Statutes (1874) was based, in part, on §16 of the 1870, but saw the latter as an interim measure in no way diminishing the right of action based on private acts of discrimination which, it believed, was created by §1 of the 1866 Civil Rights Act.

[11] See, supra, at 4 n.3.

on the merits regarding §1981; the writ of certiorari in Johnson was limited to the issue of whether the timely filing of a Title VII [12] charge with the Equal Employment Opportunity Commission tolls the running of the period of limitations for filing an action based on the same facts under §1981, and the Court's statement in Johnson that §1981 supplies a cause of action for a private racially motivated refusal to contract was dictum, made without briefs and without discussion; and Tillman held only that the respondent swimming club was not a private club under Title II of the Civil Rights Act of 1964, and not exempt as a private club from any cause of action based either on §1981 or §1982, should one exist. Id. Accordingly, the dissent in Runyon viewed §1981 as a fair subject for

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[12] Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. §2000a, et seq. (1981).

authoritative statutory construction by the Court.[13]

SUMMARY OF ARGUMENT

The Court's invitation to the parties to argue whether the decision in Runyon should be reconsidered entails a reexamination of the merits of its statutory construction. This, in turn, requires an inquiry into the intent of the Enforcement Act of 1870, as well as the 1874 enactment of §1977 of the Revised Statues. Deriving as it does from the "State action" provisions of these laws, §1981 authorizes no cause of action for purely private acts of racial discrimination.

Moreover, even consideration of the 1866 Civil Rights Act does not alter this

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[13] The concurring Justices accepted the majority's premise that §1977 of the Revised Statutes was based in part on the Civil Rights Act of 1866, but questioned or disputed the court's interpretation of that earlier enactment. 427 U.S. at 186 (Powell, J., concurring); Id. at 189-190 (Stevens, J., concurring).

conclusion. This was recognized by the dissent in Runyon. From its history, it is plain that the Civil Rights Act of 1866 specifically intended to remove the legal disabilities imposed by state laws against black citizens. Laws governing their prior status as slaves had deprived these individuals of fundamental legal capacity in such matters as contracting. The Act was intended to nullify recently enacted state laws that sought to disable freedmen by again depriving them of their legal capacity. No cause of action was provided for private acts of discrimination.

Finally, we argue that concerns for *stare decisis* should not prevent the Court from overruling Runyon. Perpetuation of the Runyon rule would, indeed, breach the constitutional separation of powers. *Stare decisis*, requires flexibility, rather than rigid adherence. Here, the principal concern

of the doctrine may be preserved despite a decision to overule Runyon.[14/]

14/ For the reasons stated in our previous brief on the merits, as well as for those stated herein, Respondent submits that Petitioner cannot maintain an action pursuant to §1981. Accordingly, the result in this matter should remain the same, even if the Court decides to reconsider Runyon.

ARGUMENT

POINT I

SECTION 1981 AUTHORIZES NO CAUSE OF ACTION FOR PURELY PRIVATE ACTS OF RACIAL DISCRIMINATION SINCE IT DERIVES FROM "STATE ACTION" PROVISIONS OF SECTION 16 OF THE ENFORCEMENT ACT OF 1870 AND SECTION 1977 OF THE REVISED STATUTES.

Viewing §1981 as derived, in part, from the Civil Rights Act of 1866, the majority in Runyon saw no need to fully discuss the effects of the Enforcement Act of 1870 on the present statute. Justice White, joined by Justice Rehnquist, dissenting, believed that this intervening law gave §1981 a different provenance than the 1866 Civil Rights Act, even if Jones correctly interpreted the 1866 statute under §1982. The dissenting opinion, in our view, was correct.

A. The Dissent In Runyon Correctly Interpreted Section 1981 As Derived from Section 16 of the Enforcement Act.

Section 1981's language does not authorize a contractual servitude for racial reasons. Justice White correctly observed that by its plain language, §1981 cannot be read to impose anti-discrimination requirements on private decisions to deal. 427 U.S. at 193-196. As there described, nothing in the statute's wording can be read to confer superior rights on Negroes or other racial minorities requiring an unwilling private party to enter into a relationship with them. The section guarantees only that "[a]ll persons" shall have the "same right .... to make and enforce contracts ... as is enjoyed by white citizens." (Emphasis). Thus, the language of the statute points to

another meaning.[15/] It suggests that §1981 is intended to remove any legal disabilities imposed on account of race, and confer legal capacity on the individual so that he may enter into enforceable contracts and enforce them in court, if necessary. Id. See Avins, The Civil Rights Act of 1866, the Civil Rights Bill of 1966, and the Right to Buy Property, 40 So. Cal. L. Rev. 274, 305-306 (1966) [hereinafter Avins, Civil Rights Act of 1866]. This conclusion is borne out by examination of the origin of §16 of the 1870 statute, which

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15/ A correct interpretation of §1981 can be made by examining the statute on its face. Although the clause "to make and enforce contracts" does not necessarily point to a distinct construction, it is surrounded by other clauses all of which require some form of state action before judicial enforcement will occur. The maxim noscitur a sociis ("it is known by its associates") suggests that the clause "to make and enforce contracts" should also be interpreted to require some form of state action. An inquiry into the legislative history supports this conclusion. See also Polaroid Corp. v. Commissioner, 278 F.2d 148 (1st Cir. 1960), aff'd sub nom. Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961), and National Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472 (1979).

Justice White correctly concluded is the true antecedent of §1981. 427 U.S. at 195 and n.6.

B. The Enforcement Act of 1870 Rendered Section 1 of the Civil Rights Act Largely Vestigial As To Contract Rights.

There can be no quarrel with the dissenting Justices' history of §16 of the 1870 Enforcement Act. It derived from the Fourteenth Amendment[16/] and was designed to give to all persons within the jurisdiction of the United States, including Chinese and other aliens, the equal protection of the laws as against State abridgment. 427 U.S. at 195-206. See Bhandari v. First National Bank of Commerce, 829 F.2d 1343, 1345-1348 (5th Cir. 1987) (en banc), petition for cert. filed, 56 U.S.L.W. 3542 (U.S. Feb. 2, 1988) (No. 87-1293); McClain, The Chinese Struggle for Civil Rights in Nineteenth Century America: The

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16/ U.S. Const. Amend. XIV, §§1, 2.

First Phase, 1850-1870, 72 Cal. L. Rev. 529, 565-568 (1986). It was not based on the Thirteenth Amendment, as was the 1866 Civil Rights Act. See Runyon, 427 U.S. at 202 (White, J. dissenting). Nevertheless, insofar as material here, §16 used language similar to that employed in Section 1 of the earlier law. It declared that aliens should:

> have the same right in every State and territory in the United States to make and enforce contracts, to sue, be parties, [and] give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens....

Thus, the real question raised by the dissent in Runyon is over the fate of §1 of the Civil Rights Act of 1866. The legislative history of the 1870 Enforcement Act shows that Section 16 eclipsed it; and the passage of §1977 of the Revised Statutes of 1874 dispatched it. Thus, the question whether §1981 authorizes a cause of action for

purely private acts of discrimination must be decided in the negative.

1. Congress Viewed Both Acts Under The Lens Of The Fourteenth Amendment.

Section 18 of the 1870 Enforcement Act "reenacted" the Civil Rights Act of 1866.[17] However, in introducing S.365, [18] which would ultimately result in §§16 and 18

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[17] Section 18 of the Enforcement Act stated:

> And be it further enacted, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby reenacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

Act of May 31, 1870, ch,. 114, §18, 16 Stat. 140, 144.

[18] "A Bill to secure to all persons the equal protection of the laws." S.365, 41st Cong., 2d Sess. (1874); brought in, read twice, referred to the Committee on the Judiciary, and ordered to be printed, January 10, 1870. See Cong. Globe, 41st Cong., 2d Sess., 1536 (February 24, 1870) (Sen. Stewart: "I move that the Senate proceed to the consideration of [S. 365] to secure to all persons equal protection of the laws." (emphasis added). (This was also the title of the bill.) S. 365 eventually became §§16-18 of the 1870 Enforcement Act.

of the 1870 legislation, Senator Stewart of Nevada, viewed the earlier statute through the equal protection clause of the Fourteenth Amendment.[19/]

He explained:

> The original civil rights bill protected all persons born in the United States in the equal protection of the laws. This bill extends it to aliens, so that all persons who are in the United States shall have the equal protection of our laws... This is all there is in the bill.

Cong. Globe, 41st Cong., 2d Sess. 1536 (February 24, 1870) (emphasis added). Moreover, the object of §16, the "Chinese

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19/ The Fourteenth Amendment was first proclaimed on July 20, 1868. On December 6, 1869, Senator Stewart introduced a resolution, which was unanimously approved, authorizing the Committee on the Judiciary to inquire, inter alia, whether the States were denying to any class of persons within their jurisdiction the equal protection of the law in violation of the Fourteenth Amendment. Cong. Globe, 41st Cong., 2d Sess. 3 (1869). However, by early 1870 no legislation had been passed. Id. at 3489 (May 16, 1870) (Sen. Morton: "[N]ow nearly two years have passed away since that amendment became the law of the land and there is no law to enforce it." Id.)

bill," in equalizing the protection of laws accorded to "persons" (including aliens) with that accorded to "citizens" under the 1866 Act (except as to property), was made clear from a colloquy between Senator Stewart and Senator Pomeroy:

> Mr. Pomeroy: I have not examined this bill, and desire to ask the Senator from Nevada a question. I understood him to say that this bill gave the same civil rights to all persons in the United States which are enjoyed by citizens of the United States. Is that it?
>
> Mr. Stewart: No; it gives all the protection of the laws. If the Senator will examine this bill in connection with the original civil rights bill, he will see that it has no reference to inheriting or holding real estate.
>
> Mr. Pomeroy: That is what I was coming to.
>
> Mr. Stewart: The civil rights bill had several other things applying to citizens of the United States. This simply extends to foreigners, not

> citizens, the protection of our laws where the State laws deny them the equal civil rights enumerated in the first section.

Id. [19]

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[19] Some time later, when Senator Stewart offered a slightly modified version of S.365 as part of Senator's Edmund's bill (S.810) to enforce the Fifteenth Amendment, Senator Stewart again focused on the "equal protection" needed by Chinese aliens for the legal capacities conferred on citizens by the 1866 Act:

> Mr. Stewart: While [Chinese aliens] are here I say it is our duty to protect them. I have incorporated [S.365] in this bill on the advice of the Judiciary Committee, to facilitate matters and so that we shall have the whole subject before us in one discussion. It is as solemn a duty as can be devolved upon this Congress to see that those people are protected, to see that they have the equal protection of the laws, notwithstanding that they are aliens. They, or any other aliens, who may come here are entitled to that protection. If the State courts do not give them the equal protection of the law, if public sentiment is so inhumane as to rob them of their ordinary civil rights, I say I would be less than man if I did not insist, and I do here insist that that provision shall go on this bill, and that the pledge of this nation shall be redeemed, that we will protect Chinese aliens or any other aliens whom we allow to come here, and give them a hearing in our courts; let them sue and be sued; let them be protected by all the

(continued...)

Thus, the applicable "provisions of the 1870 Enforcement Act spr[a]ng from a different source than the 1866 statute -- a concern for the shameful treatment of alien Chinese in California." McClain, supra, at 529. Yet, because of the apparent similarities between the two provisions, §16 naturally would be seen as largely superseding §1 of the Civil Rights Act.[20]

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[19] (...continued)

> laws and the same laws that other men are. That is all there is in that provision." Id. at 3658 (May 24, 1870) (emphasis added).

Later, Sen. Stewart would emphasize, "[N]o state shall deny to any person, whether he is an alien or native-born citizen, the equal protection of the laws." Id. at 3808 (May 25, 1870). (emphasis added).

[20] Changes in the proposed wording of the Enforcement Act reveal the drafters' belief that §16 of the 1870 Enforcement Act would generally supplant the 1866 law as to those rights common to both. As originally drafted, Section 18 of the 1870 Act not only recited that the 1866 Act was reenacted, but it also stated, "and said Act, except the first and second sections thereof, is hereby referred to and made a part of this Act." Cong. Globe, 41st Cong., 2d Sess. 1536 (1870) (emphasis added). Later, however, this

(continued...)

2. The Reasons for the Reenactment of the Civil Rights Act in Section 18 Support The Derivation of Section 16.

Since Congress was uncertain of its authority to enact the Civil Rights Act under the Thirteenth Amendment, Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 651 (1979) (White, J., concurring); Mahone v. Waddle, 564 F.2d 1018, 1037 n.1 (1977) (Garth, J., dissenting), action under the Fourteenth Amendment was necessary to assure that the property rights protection ("to inherit, purchase, lease, sell, hold, and convey real and personal property....") accorded citizens,

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20/(...continued)
underscored provision was dropped in favor of the phraseology adopted in §18: "and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act." Act of May 31, 1870, ch. 114, §18, 16 Stat. 140, 144. Thus, even if the original proposal suggested a specific intention to reenact §§1 and 2 of the 1866 Act and maintain them independently of the analogous provisions of the 1870 Act (i.e. §§16 and 17), that articulation was abandoned in favor of a general wording more consistent with the views of Senator Stewart.

but not aliens, under the 1866 statute would continue. This protection had purposely been omitted from §16 of the 1870 Act.21/

21/Senator Stewart answered a fellow Senator's inquiry, as follows:

> Mr. Pomeroy: Does the property of a foreigner here descend under our laws? Most of the States appoint a public administrator who administers upon the estates of foreigners differently from what he does on the estates of citizens. Does [S. 365] interfere with that?
>
> Mr. Stewart: I think not.
>
> * * *
>
> Mr. Stewart: [S. 365] has nothing to do with property or descent. We left that part out of the law.

Cong. Globe, 41st Cong., 2d Sess. 1536 (1870).

The omission as to real property accords with prevailing jurisprudence under Article IV, Sec. 2 of the Constitution, that only citizens had the right to own real property. The omission of rights respecting personal property from §16 is probably explained by the fact that it was not a part of "protection of the laws" at the time. Avins, Civil Rights Act of 1866, supra, at 304.

Congress also sought to use the enforcement machinery of the 1866 Act in connection with §16 and other, voting rights provisions of the Enforcement Act. Section 18 effected this purpose.[22/]

C. Section 1977 of the Revised Statutes Was A Modified Reenactment of Section 16.

The language and history of §1977 of the Revised Statutes of 1874 (the former designation of §1981) show that it derives only from §16 of the 1870 Act. Since Section 16 is indisputably a Fourteenth Amendment statute requiring state action, and §5596 of the Revised Statutes repealed §18 of the 1870 Act, §1981 cannot be invoked against purely private acts of racial discrimination.

The language of §1977 is drawn verbatim from the first portion of §16 of the 1870 Act, as was demonstrated in Justice

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[22/] Cong. Globe, 41st Cong., 2d Sess. 3560-3561 (May 18, 1870) (Senator Stewart).

White's dissenting opinion in Runyon, 427 U.S. at 195 n.6.

The headnote notation which appears in the margin next to §1977 of the Revised Statutes confirms its origin.[23/] The notation reads:

> Equal rights under the law.
> 31 May, 1870, c. 114, s. 16, v. 16, p. 144.

[23/] As noted by Justice White:

> The title of 1981 was placed there originally by the Revisers who compiled the Revised Statutes of 1874. They did so under a statute defining their responsibilities in part, as follows: to "arrange the [statutes] under titles, chapters, and sections, or other subtitle divisions with head notes briefly expressive of the matter continued in such divisions." 14 Stat. 75. (Emphasis added). The headnote to what is now §1981 was before Congress when it enacted the Revised Statutes into positive law. It may properly be considered as an aid to construction, if the statutory language is deemed unclear. [Citations omitted].

427 U.S. at 193 n.3.

The history of the Revised Statutes makes clear that this final notation accurately reflected the intention of Congress in enacting the current statute.

1. The 1872 Report of the Commissioners for Revision of the Statutes Indicates That §1977 Was Derived Only From §16.

As early as 1843, Congress expressed a desire to revise the Statutes at Large, which by then had become nine volumes of unindexed and unorganized laws.[24/] Under the Act of June 27, 1866, 14 Stat. 74, as reenacted by the Act of May 4, 1870, c. 72, 16 Stat. 96, Congress empowered three Commissioners to revise the Statutes at Large and to

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[24/] For a more complete discussion, see Dawn and Feidler, The Federal Statutes - Their History and Use, 22 Minn. L. Rev. 1008 (1938); Burdick, The Revision of the Federal Statutes, 11 A.B.A.J. 187 (1925); 1 Superintendent of Documents, Checklist of United States Public Documents 1789-1909, (3d ed. 1911) at 968-970, 1524-1525; Blodgett, The Revised Statutes of the United States, Read Before the Social Science Association of Philadelphia, Dec. 16, 1875 as reprinted from the Penn Monthly, January 1876.

make headnotes and marginal notes providing guidance as to the origin, breadth, and judicial interpretation of the revised sections. Id.

> [T]he Commissioners [were] to bring together all statutes and parts of statutes which, from similarity of subjects, ought to be brought together, omitting redundant or obsolete enactments, and making such alterations as may be necessary to reconcile the contradictions, supply the omissions and amend the imperfections of the original text. §2, 14 Stat. 75. (emphasis added).

Under §3, 14 Stat. 75, the Commissioners were to "suggest to Congress such contradictions, omissions and imperfections as may appear in the original text." Id., §3. They also had that option of designating such statutes for repeal. Id.

The future §1977 emerged from these endeavors with the following headnote and marginal notations:

Equal rights under the law.

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31 May, 1870, c. 114, s.16, v. 16, p.144

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1 Abb. U.S. 28, 84, 338.[25]

The headnote and marginal note, except for the case citations, would appear next to §1977 of the Revised Statutes.

The majority in Runyon mistakenly relies on the absence of such a designation in the Commissioner's Report[26] to show that the failure to cite the Civil Rights Act of 1866 occurred "either inadvertently or on the assumption that the relevant language of §1 of the 1866 Act was superfluous." 427 U.S. at 167 n.8.

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[25] Revision of the United States Statutes as Drafted by the Commissioners Appointed for That Purpose, v.1, p. 85 (1872) (Library of Congress No. "KF 50.U5").

[26] Id. at Title XXVI §§8, 24.

First, under §2, 14 Stat. 75, the Commissioners were to make alterations only if they found contradictions, omissions or imperfections in the original text. There was no such problem with §16 of the 1870 Act. Therefore, there was no reason to promise an explanation.

Second, the majority in Runyon suggests the Commissioners omitted §1 of the 1866 Act because it was "superfluous." That may be; or, they may have viewed the 1866 Act as obsolete insofar as §16 offered apparently similar coverage. In either case, their mandate allowed it. More importantly, it shows an intention to eliminate §1 as a source of the Revised Statutes.

A valuable insight into the thinking of the commissioners comes from Benjamin Vaughan Abbott, one of the three Commissioners who submitted the 1872 Report.

In quoting the text of §1 of the Civil Rights Act of 1866 in his National Digest, Abbott italicized certain words, but not others. He explained:

> The words italicized are embodied in Rev. Stat. Section 1978; the other portions of this section have been superseded, either by later enactments which have been embodied in other sections of the Revision (see tit. XXIV.) or by the 14th amendment of the Constitution.

1 Abbott's National Digest at 639 n.1 (1884) (emphasis added). Title XXIV contained the provisions on Civil Rights, including §1977. Thus, the sole citation of §16 of 1870 Act may be explained by the Commissioners' perception that the "later enactment" of §16 superseded § 1 of the 1866 Act.

2. The Further Revisions of Thomas J. Durant Maintained The "Equal Protection" Headnote of Future §1977.

After the Commissioners submitted their report in 1872, Congress realized that the Commissioners may have engaged in

legislation. Thus, Congress stated in an Act of March 3, 1873[27] that its receipt of the report should not "be construed as an approval or adoption by Congress of any part of the work of the Commissioners." Under authority of this Act, Congress hired Thomas Jefferson Durant to correct the Commissioners' excesses and issue a report in the form of a bill. H.R. 1215, 43rd Cong., 1st Sess. (1874).[28]

Durant's report contained no marginal notations,[29] for none were required under his mandate. Section 1977 only bore the headnote, "Equal rights under the law."[30] Durant's accompanying report did not criticize

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[27] 17 Stat. 579, ch. 241.

[28] See Durant, Report on Revision of Laws (13 pp. - untitled) (1873), Library of Cong., LL Rare Book coll.

[29] Unmarked Copy of T.J. Durant's Revision. Reported Dec. 1873. Library of Cong., LL Rare Book Coll. [hereinafter Durant's Revision].

[30] Id.

the Commissioners' Report[11] with respect to the future §1977.[12]

Congressional Joint Committee members, as well as others, then canvassed Durant's report for errors.[13] The future §1977 was left untouched. In December 1873, Durant's report, absent marginal notations, but with headnotes, went before Congress.[14] The headnote for §1977 (Title XXIV) was "Equal rights under the law."[15]

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[11] Durant, Report on Revision of Laws.

[12] Durant's Revision, Article XXIV, §1982.

[13] Blodgett, supra, at 11-13; E.g., New York Chamber of Commerce, Title No. 8, Revision of the Commissioners' Draft (1873).

[14] 2 Cong. Rec. (H) 810 (Jan. 21, 1874) and (H) 1210 (Feb. 4, 1874).

[15] Id. at 650 (Rep. Lawrence).

3. Representative Lawrence's Explanation of the Revision Supports the Commissioners' Interpretation of §1977.

Representative Lawrence, a member of the Joint Committee on the Revision of the Laws, used the 1866 and 1870 civil rights laws to illustrate how the revisers operated.[16] Lawrence explained that:

> In the reported draught of the commissioners, as in Durant's revision, act of May 31, 1870, is very properly not treated as a revision of the whole subject, and hence as superceding the entire original act. The commissioners ... and Mr. Durant ... translate the sections ... from the acts of 1866 and 1870, so far as they relate to a declaration of existing rights, and confer a right of civil action for their violation as follows:

Equal rights under the law.

> SECTION 1. All persons within the jurisdiction of the United

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[16] 2 Cong. Rec. 819-829 (1874). Copies of Durant's revision had been printed and distributed to Members of the House of Representatives. Representative Lawrence apparently had a copy of the Commissioners' draft in his possession, but it does not appear that copies were given to the Members during the debates. Id.

31 May, 1870, ch. 144, §16, vol. 16, p. 144.

1 Abb. U.S. 28, 84, 388.

States shall have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceeding for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Rights of citizens in respect to real and personal property

9 April, 1866, ch. 31, §1, vol. 14, p. 27.

SEC.2. All citizens of the United States shall have the same rights, in every State and Territory, as enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Civil action for deprivation of rights.

20 April, 1871, ch. 31, §1, vol. 14, p. 27.

SEC.3. Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

2 Cong. Rec. 828.[12] After noting that the second sentence of §16 of the 1870 Act (referring to the taxation of immigrants) was retained in Durant's version elsewhere in his volume, Rep. Lawrence then remarked:

> A comparison of all these could present a fair specimen of the manner in which the work has been done, and from these all can judge

[12] Before Congress passed 18 Stat. (Pt. III) 113, on May 20, 1874, Rep. Lawrence explained, "[M]arginal references are all omitted in Durant's revision... When the [Revised Statutes] shall be adopted by Congress, provision can be made for adding in its publication the marginal references and footnotes suggested." 2 Cong. Rec. 827 (January 21, 1874).

of the accuracy of the translation.[38]

There was no further discussion of these provisions on the record. The bill enacting the Revised Statutes was passed by the House, Id. at (H) 2713-2714, and by the Senate after only cursory discussion. Id. at (S) 4284-4286.

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[38] 2 Cong. Rec. 828. Rep. Lawrence said earlier in his remarks, that following the adoption of the Fourteenth Amendment, §§16 and 17 of the 1870 Act reenacted "in modified words the substance of the original civil-rights sections." Id. at 827. Lawrence's remarks during the debates over the 1866 Civil Rights bill show that he viewed the original provisions as directed against state-imposed disabilities and actions taken under color of law. Cong. Globe, 39th Cong., 1st Sess. 1832-1836 (1866). See, infra, at 82-83. Thus, his reference to this "reenactment" does not signify that the 1870 reenactment of the Civil Rights Act reached purely private conduct. Also, he made no effort to reconcile this explanation with the reenactment of the 1866 Act in Section 18.

4. The Secretary of State's Addition of Marginal Notations Further Supports The "State Action" Interpretation of § 1977.

Shortly before the Revised Statutes were approved by President Grant,[39] Congress authorized the Secretary of State to complete the headnotes and marginal notations and thereafter to cause the publication of the Revised Statutes.[40] Under this bill, the

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[39] See 2 Cong. Rec. 5388 (June 22, 1874).

[40] 18 Stat. (Pt. III) 113, 43rd Cong., 1st Sess., ch. 333, §2 (1874), provided:

> That the Secretary of State is hereby charged with the duty of causing to be prepared for printing, publication and distribution the revised statutes of the United States enacted at this present session of Congress; that he shall cause to be completed the head notes of the several letters and chapters and the marginal notes referring to the statutes from which each section was compiled and repealed by said revision; and references to the decisions of the courts of the United States explaining or expanding the same, and such decisions of State courts as he may deem expedient, with a full and complete index to the same. And when the same shall be

(continued...)

published volumes were to be "legal evidence of the laws and treaties therein contained." 18 Stat. (Pt. III) 113. It is evident Congress intended that the notation next to §1977 should be relied upon as describing the sources of the statute. In any case, the headnote, "Equal rights under the laws,"

40/(...continued)
completed, the said Secretary shall duly certify the same under the seal of the United States, and when printed and promulgated as hereinafter provided, the printed volumes shall be legal evidence of the laws and treaties therein contained, in all the courts of the United States, and of the several States and Territories. (emphasis added).

Of course, in enacting the Revised Statutes, Congress included §5596 which provided:

> All acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in many sections of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof....

remained,41/ and when, on February 22, 1875, Secretary of State Hamilton Fish certified the Revised Statutes, the only marginal notation was that relied on by Justice White. Revised Statutes of the United States, Washington, G.P.O. (1875) (National Archives - Diplomatic Branch).

It is clear from this exposition that no right of action to remedy purely private acts of discrimination can be inferred from the passage of §1977 of the Revised Statutes. The 1870 Act was not treated "as a revision of the whole subject" because the reference to property rights in the 1866 Act was now specifically treated in §1978.

41/The engrossed Act, dated June 22, 1874 bearing the autograph signature of James G. Blaine, Speaker of the House, Matthew H. Carpenter, President of the Senate, and President Grant, also contains headnotes, but no marginal notations. This copy also bears the stamp of the Secretary of State, signifying he had received the engrossed act and would prepare it for printing. 2 Cong. Rec. 5388 (1874). The engrossed Act is currently deposited in the National Archives.

Representative Lawrence's remarks do not imply a continued vitality for §1 of the Civil Rights Act authorizing suit for acts unrelated to official conduct or laws. By including in the record the future §1979, which was derived from Section 1 of the Ku Klux Klan Act of 1871[42] and contained a "color of law" requirement for a civil action, Rep. Lawrence made plain that the redress contemplated for violation of §§1977 and 1978 was to have a state action component. This would be consistent with the views expressed by Senator Stewart in 1870 emphasizing a Fourteenth Amendment objective for §16.

But there is more. The civil rights enactments of April 9, 1866, May 31, 1870 and April 20, 1871, also contained criminal

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[42] Act of April 20, 1871, ch. 22, §1, 17 Stat. 13.

sanctions.[43] In Mr. Durant's draft, Rep. Lawrence pointed out, the three provisions, each worded differently and possibly covering different crimes, were combined into one provision (§5577) made applicable to violations of rights in each of the three acts. 2 Cong. Rec. 828 (Jan. 21, 1874). The Revisers also had translated the provision of the three statutes into one Section, employing different language. Rep. Lawrence criticized the Reviser's source note as being inadequate:

> Their marginal reference is only to act of "31 May 1870, ch. 114, sec. 17, vol 16, p. 144" and certainly is not sufficiently comprehensive to include all covered by the first section of the "Ku Klux Act" of April 20, 1871, and the omission is not elsewhere supplied in the published volumes of their revisions.

Id.

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[43] These were, respectively, §2 of the Act of April 9, 1866, §17 of the Act of May 31, 1870, and §1 of the Act of April 20, 1871.

Rep. Lawrence made no such criticism of the marginal reference beside the text of future §1977. Specifically, he did not complain that no reference was made to the 1866 Act. Clearly, he saw §16 as the sole source in the Revised Statutes.

D. Petitioner's Argument That §1981 Authorizes Suits For Private Discrimination By Incorporating Section 1 of the Civil Rights Acts Is Unpersuasive.

Petitioner nevertheless contends that Justice White erroneously relied on the volume of the Revised Statutes published after the 1874 enactment, and that the marginal notes in an earlier draft prepared by the Revisers, which were before Congress when it enacted the revision into positive law, contain citations to cases allegedly showing that §1977 derived from §1 of the 1866 Civil Rights Act as well as §16 of the Enforcement Act of 1870. (Pet. Br. at 9). This argument lacks merit.

1. Petitioner's Arguments Are Irrelevant.

None of this criticism gainsays Justice White's points that (a) the language of §1977 is drawn from §16 rather than §1, and (b) that the headnote of §1977, "Equal rights under the law.", prepared pursuant to the statutory directive, is plainly descriptive of an equal protection object. 427 U.S. at 193 n. 3, 197 n.6.

Further, whatever draft may have been before it in 1874, Congress clearly authorized the "printed volumes" of the Revised Statutes to include marginal notes prepared at the direction of the Secretary of State. When published, the marginal notes read exactly as Justice White described. In any event, Petitioner's reliance on the missing citations is misplaced.

2. Despite Petitioner's Contention, The Citations in the Commissioners' 1872 Report Imply A State Action Requirement Consistent with §16.

Contrary to Petitioner's contentions, the citations to the decisions in United States v. Rhodes, 27 F. Cas. 785, 1 Abb. U.S. 28 (C.C.D. Ky. 1866) (No. 16, 151), and In re Turner, 24 F. Cas. 337, 1 Abb. U.S. 84 (C.C.D. Md. 1867) (No. 12, 247), contained in the Revisers' marginal notes next to the proposed §1977, do not lead to a conclusion that the section is derived from the 1866 Civil Rights Act and was intended to permit suits for purely private acts of discrimination. (Pet. Br. at 5-7).[44] The citations to these cases

[44] Rhodes involved the prosecution of a white man for burglary of the home of a black citizen. Under the laws of Kentucky, the victim was prohibited from testifying in court against the accused, because of her color. The Court (per Swayne, C.J.) held that removal to federal court was appropriate under §3 of the Civil Rights Act of 1866. 27 F.Cas. at 787, 789, 794.

(continued...)

in the Revisers' 1872 draft do not show that §1981 was intended to authorize suits for private acts of racial discrimination as a legacy of the 1866 Act, or that Congress so perceived it. Indeed, Rhodes illustrated that "the court took jurisdiction on the ground that the statute of Kentucky discriminated against colored citizens." 2 Cong. Rec. (H)413 (Jan. 6, 1874) (Rep. Lawrence) (emphasis added), whereas Turner was "[t]he case of the

[44] (...continued)
In Turner, a habeas corpus proceeding, Maryland had adopted a new Constitution abolishing slavery, effective November 1, 1864. The petitioner, a youth, who had been a slave of the respondent, and others were collected together under local authority and were bound as apprentices to their former masters. The terms of petitioner's indenture which was "claimed to have been executed under the laws of Maryland relating to Black apprentices," did not provide for education and permitted petitioner to be assigned and transferred at the master's will to any person in the county. 24 F. Cas. at 339. The Court (per Chase, C.J.), found that the arrangement was an involuntary servitude barred by the Thirteenth Amendment and violated the "full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, as provided by the 1866 Act." Id. The petitioner was ordered discharged. Id. at 340.

apprentice slave, held under the law of Maryland, liberated by Chief Justice Chase on a writ of habeas corpus under [the Thirteenth Amendment]..." Slaughter House Cases, 83 U.S. (16 Wall.) 36, 69 (1873) (emphasis added).[45/] Accordingly, they are consistent with a view that deprivations under color of law and disabling state statutes were the target of §1977.[46/]

[45/] The petition in Turner was filed on September 20, 1867. 24 Fed. Cas. at 338. By Act of February 5, 1867, 14 Stat. 385, Federal courts were given authority to grant writs of habeas corpus for persons held under state authority "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States...." It appears that the writ in Turner was issued under this statute. Id. at 340. Cf. Ex Parte Bollman, 8 U.S. (4 Cranch) 75, 94 (1807)(the power to issue the writ by any United States court "must be given by written law")(per Marshall, C.J.).

[46/] Petitioner does not mention the third case cited by the Revisers, The Live Stock, etc. Ass'n v. The Crescent City, etc. Co., 1 Abb. U.S. 388 (C.C.D. La. 1870) (later known as The Slaughter House Cases, 83 U.S. 36 (1973) at the Supreme Court level). Like Turner and Rhodes, this case involved state action, i.e., a statute creating a slaughter house monopoly in New Orleans.

In sum, §1977 of Revised Statutes, the present §1981, was based upon §16 of the 1870 Enforcement Act, which required state action. Section 16 was seen to supercede §1 of the 1866 Act as to those matters covered by both.

In fact, however, the 1866 statute never did authorize suits for private acts of discrimination.

We consider this next.

POINT II

THE CIVIL RIGHTS ACT OF 1866 WAS INTRODUCED TO REMOVE THE LEGAL DISABILITIES IMPOSED BY STATE LAW AGAINST BLACK CITIZENS

A. The Theory That The Civil Rights Act of 1866 Was Intended To Reach Private Action Is Inconsistent With The Political Dynamics Of The Early Reconstruction Era.

The passage of a federal statute that prohibited private racial discrimination would have been improbable under the political conditions that existed in 1866. Admittedly, the dominant Republican party was concerned with the condition of the freed slaves in the Southern states. The Civil Rights Act, however, applied to both Northern and Southern states. Given this nationwide applicability, other factors limited the scope of federal legislation that Republicans were willing to consider.

One of the most important of these factors was a widely shared desire to limit the role of the federal government in everyday

life. Although rejecting the Confederate theory of state sovereignty, most Republicans nonetheless believed that Congress should leave the regulation of most affairs to the states.[42] Condemnations of the idea of centralization reverberated through the Reconstruction debate. The views of Republican Representative Thomas T. Davis of New York -- later a supporter of the Civil Rights Act in its final form -- are typical:

> [T]he distinguishing feature in our Government is this: the Federal Government has its peculiar and restrictive duties. It is a government of limited power and authority, extending over the whole country...but within that jurisdiction are erected many different States bound to allegiance to the Federal Government in all matters pertaining to the Union, yet in respect of social arrangement, in respect of the rights of property and control of persons, are entirely independent. And it is this feature which has given greater security and greater liberty to this country than

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[42] Maltz, Reconstruction Without Revolution: Republican Civil Rights Theory In The Era of the Fourteenth Amendment, 24 Houston L. Rev. 221, 232-236 (1987) [hereinafter Maltz, Reconstruction].

> was ever conferred before by any system of government which human wisdom has devised.

Cong. Globe, 39th Cong., 1st Sess. 1083 (1866). Influential Republican Senator James W. Grimes of Iowa expressed similar sentiments:

> During the prevalence of the [Civil War] we drew to ourselves here as the Federal Government authority which had been considered doubtful by all and denied by many of the statesmen of this country. That time, it seems to me, has ceased and ought to cease. Let us go back to the original condition of things, and allow the States to take care of themselves as they have been in the habit of taking care of themselves.

Id. at 2446 (1866). See also, e.g., Harper's Weekly, November 10, 1866 at 706; Open Letter from Carl Schurz to William Fessenden, Cincinnati Commercial, May 18, 1866, p. 2; Springfield Republican, April 5, 1866, p. 4; M. Hyman, A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution, 300-301, 393-396 (1973).

If the Civil Rights Act had been intended to regulate purely private activity, it would have been totally inconsistent with this philosophy. The Bill would not only have effected a truly revolutionary change in the federal system but would also have been entirely inconsistent with the very natural rights theory which the Republicans sought to implement. Maltz, Reconstruction, SUPRA, at 262.[44/] Implicit in the concept that parties should be free to contract and to have the courts enforce voluntarily concluded agreements, is that the parties are free to refuse to enter into contracts. 427 U.S. at 193-195 (White, J., dissenting). To infer an intention to interfere with private decision-

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[44/] The Civil Rights Act was intended to guarantee certain limited rights to all citizens. These derived from the "natural" rights suggested by the Court in Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3, 230), cited by Sen. Trumbull in the debates. Cong. Globe, 39th Cong., 1st Sess. 474-475 (Jan. 29, 1866).

making generally would be inconsistent with basic Republican political theory. Maltz, Reconstruction, supra, at 262.

In essence, the decision in Runyon would have had an early Reconstruction Era Congress applying federally-created standards to every private transaction which involves nonwhite parties. These standards would have been applicable in the Northern states as well as the vanquished Southern states. Such an interpretation is hardly consistent with the expressed Republican commitment to the concept of a limited federal government.

Further, the very idea of a general prohibition on racial discrimination in private transactions was entirely foreign to the American political system when the Civil Rights Act was being considered. No state, no matter how strongly Republican, had adopted such a statute in 1866. Also, while Congress had abolished legally-created distinctions

based on race in the District of Columbia, a jurisdiction in which issues of federalism were not important,[29] the federal government had not seriously considered prohibiting private discrimination in the District. Thus, a general prohibition on private racial discrimination would have been an entirely novel legal concept in 1866.[30]

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[29] See M.L. Benedict, A Compromise of Principle: Congressional Republicans and Reconstruction 1863-1869 145-146 (1974).

[30] Some efforts had been made to eliminate racial discrimination in public accommodations--particularly common carriers. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 474 (1968) (Harlan, J., dissenting); Maltz, "Separate But Equal" and the Law of Common Carriers in the Era of the Fourteenth Amendment, 17 Rut. L.J. 553 (1986). State authority over such facilities was based on the theory that operators of railroads, inns and the like were viewed as occupying "a sort of public office," with "public duties to perform." New Jersey Steam Navigation Co. v. Merchants Bank, 47 U.S. (6 How.) 344, 382-383 (1848). See also Derry v. Lowry, 6 Phila. Rep. 30, 31 (Common Pleas 1865); Maltz, supra, at 566-567. Thus prohibitions on racial discrimination in public accommodations provide little authority for similar restrictions on private action generally. Brief Amicus Curiae of Eric Foner, et al., at 21 nn. 17 and 18 erroneously relies on such cases to support their (continued...)

Such a prohibition would have been considered an extremely radical action to say the least. Yet the Civil Rights Act was generally considered a moderate Reconstruction measure. M.L. Benedict, supra, at 148-149, 164-165.

The Act was drafted by Senator Lyman Trumbull of Illinois, one of the more conservative mainstream Republicans in the 39th Congress. Id. at 149 n.53. Further, it was supported by a broad coalition of Republicans, including men such as Representative Davis and Senator William M. Stewart, both of whom opposed early attempts to explicitly arm Congress with the power to

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contrary and equally erroneous conclusion that §1981 should apply to private conduct. See Avins, The Civil Rights Act of 1875: Some Reflected Light On the Fourteenth Amendment and Public Accommodations, 66 Col. L. Rev. 873 (1966), and Avins, The Civil Rights Act of 1875 and "The Civil Rights Cases" Revisited: State Action, the Fourteenth Amendment, and Housing, 14 U.C.L.A. L. Rev. 5 (1966).

reach private activity. See Cong. Globe, 39th Cong., 1st Sess. 1083-1087 (1866) (Davis); Id. at 1082 (Stewart). None of these influential legislators would have been likely to endorse a radical statute.

In short, even if there were no direct evidence on the point, the political dynamic that generated the Civil Rights Act of 1866 renders the Runyon interpretation implausible.

The case against applying section 1981 to private activity need not be based solely on inference and circumstantial evidence. During the course of the debate over the Civil Rights Act, supporters consistently and explicitly denied any intention to regulate private activity.

> The debate in Congress and journalistic commentary show that Republicans adopted a moderate position which called for an intrusion of federal power only part of the way into the civil rights field. Republican lawmakers intended to redress and place restrictions upon state actions in relation to Negroes, not supersede

> state power over private actions that violated blacks' rights. Subject to the conditions in the civil rights bill, which were designed to prevent the kind of flagrant discrimination passing beyond mere diversity that the black codes represented, states would remain the principal centers of republican government. The bill thus embodied a theory of state action as a limitation on federal power.

Belz, A New Birth of Freedom, The Republican Party and Freedmen's Rights, 1861-1866 166 (1976).

As we discuss below, the Civil Rights Act of 1866 itself was a statute of limited scope. Its proponents did not envisage that it would be applied to remedy acts of purely private discrimination. Rather, they intended to protect United States citizens by assuring that they would not be deprived of essential rights through disabling legislation or adverse enforcement efforts. To better appreciate the context in which the Act arose, it is important to review the pre-Civil War laws which deprived the enslaved

Negro of his most fundamental civil rights, for they show the evil which the Civil Rights Act sought to remedy.

B. Ante-Bellum Laws Deprived Slaves of Fundamental Legal Capacity.

The laws which disabled slaves before 1865 left them bereft of elemental rights accorded citizens throughout the country. "A slave ... has no civil rights or privileges. He is incapable of making or discharging a contract ...," stated Justice Story. Emerson v. Howland, 8 F. Cas. 634 (C.C.D Mass. 1816) (No.4,441). Similarly, in Jenkins v. Brown, 25 Tenn. 299 (1845), the court wrote:

> It is unquestionably true, that a slave has no right to acquire and hold property or money; that he and every thing of his earnings belongs to his master; and that he can make no contract which is obligatory upon himself, or the person contracted with.

Id. at 302 (emphasis added). Another court, in Bailey v. Poindexter's Executor, 14 Va. (55

Gratt) 132 (1858), quoting 2 Kent, Commentaries 253, similarly observed:

> [Slaves] cannot take property by descent or purchase, and all they find and all they hold belongs to the master. They cannot make lawful contracts, and they are deprived of civil rights.

Id. at 190 (emphasis added).

As one commentator has concluded:

> In contrast with the rights of citizens of the United States, a slave did not have the capacity to make a contract on his own account... and an executory contract with a slave acting on his own account was void... even with his own master.[51]

Continuing, the author notes:

> Nor could a slave who made any promise in writing be sued thereon, even after he became free... and even if the promissory note sued on was the inducement for his own emancipation.... Conversely, a promissory note given to a slave for money was void and could not support an action.... As the Supreme Court of Alabama remarked: "The status of a slave, under our laws, is one of entire abnegation of civil capacity .... He has no authority to own anything of value, nor can he convey a valuable thing to another."[52]

[51] Avins, The Civil Rights Act of 1866, supra, at 280 (citations omitted).

Moreover, prohibitions against buying from, selling to, or borrowing money from a slave were enforced by criminal statutes, to further suppress any spirit of personal freedom in slaves.[53] Slaves, then, were "utterly disabled." Fable v. Brown, 11 S.C. Eq. (2 Hill Eq.) 378, 391-92 (1835).

It was against this background that Congress enacted the Civil Rights Act of 1866.

C. The Civil Rights Act of 1866 Nullified State Laws Disabling Freedmen and Granted Essential Legal Capacity, But Did Not Include A Cause Of Action For Private Acts Of Discrimination.

1. The Statute

Section 1 of the Civil Rights Act of 1866 guaranteed to all United States citizens

[52] Id. at 281 (emphasis added; citations omitted). The slave's earnings as well as other property belonged to the master. Id. at 282.

[53] Id. at 283-84.

"the same right" as was enjoyed by white citizens to make and enforce contracts and exercise other specified rights. As Justice White concluded in Runyon, with respect to §1981:

> The state by its terms does not require any private individual or institution to enter into a contract or perform any other act under any circumstances; and it consequently fails to supply a cause of action by respondent students against petitioner schools based on the latter's racially motivated decision not to contract with them.

427 U.S. at 194-195 (footnote omitted) (dissenting opinion). Further, §2 of the 1866 Act, containing penal provisions, by its terms only applied to actions taken under "color of law." Finally, as Judge Garth has demonstrated at considerable length in Mahone v. Waddle, 564 F.2d 1018 (3d Cir. 1977), Section 3 of that Act did not "confer upon the federal courts original jurisdiction to entertain private claims under that Act." Id.

at 1044, 1045-1049 (dissenting opinion). It is strange, indeed, that Congress would have created a right to sue for private acts of racial discrimination in a statute specifically recognizing the short comings of state court proceedings without providing a federal forum in which to bring those claims. Yet, as Judge Garth concludes, it was not until 1871, with the passage of the Ku Klux Klan Act that a federal remedy would have been provided for §1 violations. Id. at 1038-1044.[24/] And then, the remedy was limited to deprivations "under color of any law, ordinance, regulation, custom or usage...." Id. at 1041, citing Rev. Stat. §§564 (12), 629

[24/] See also Sen. Lawrence's comments on the relationship between the current §§1981, 1982 and 1983, supra, at 33-35.

(16).[11/]

2. The Civil Rights Act of 1866

a. The Debates in the Senate

According to Senator Lyman Trumbull, the Chairman of the Senate Judiciary Committee and Sponsor of the bill[12/], S.61 (the eventual Civil Rights Act of 1866) was intended to secure the inherent rights of freemen, as authorized under the Thirteenth Amendment. Cong. Globe, 39th Cong., 1st Sess. 474 (Jan. 29, 1866). The principal obstacle to attaining this goal, he said, were the black codes:

> And of what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slave holding States laws are to be

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[11/] Cf. 42 U.S.C. §1343(3) and §1983, the latter being derived from Rev. Stat §1979, which also originated in §1 of the Klu Klux Klan Act. Id. at 1037-1038 n.1.

[12/] "It is the sponsor that we look to when the meaning of the statute is in doubt." Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951)

> enacted and enforced depriving persons of African descent of privileges which are essential to freemen

Id. After addressing some of the abuses found under the recent laws of Mississippi and South Carolina, Senator Trumbull continued:

> Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the constitutional amendment.

Id;[13/] See also id. at 588-89 (Feb. 1, 1866)

[13/] This theme was not new to Senator Trumbull. On December 13, 1865, addressing a bill (S.9) introduced by Sen. Wilson (Mass.), an early civil rights measure which failed, Trumbull said:

> The second clause of [the thirteenth] amendment was inserted for some purpose, and I would like to know of the Senator

(continued...)

37/(...continued)

from Delaware for what purpose? Sir, for the purpose and none other, of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared to be free. It was inserted expressly for the purpose of conferring upon Congress authority by appropriate legislation to carry the first section into effect.

Id. at 43 (emphasis added).

Similarly, in connection with the Freedmen's Bureau Bill (S.60), a companion measure to the Civil Rights Act which would pass in Congress, but meet its demise in a Presidential veto, Trumbull repeatedly viewed the black codes as badges and incidents of slavery, abolished by the Thirteenth Amendment. Id. at 322 (Jan. 19, 1866). He also made clear that the annulment of these laws was the common object of the Civil Rights Act:

> If in order to prevent slavery Congress deem it necessary to declare null and void all laws which will not permit the colored man to contract, which will not permit him to testify, which will not permit him to buy and sell, and to go where he please, it has the power to do so, and not only the power, but it becomes its duty to do. That is what is provided to be done by this bill. Its provisions are temporary; but there is another bill on your table, somewhat akin to this, which is intended to be permanent, to extend to all part of the country, and to protect persons of all races in equal civil rights.

(continued...)

(Rep. Donnelly) (describing black codes in southern states).

Trumbull proceeded to describe Section 1 of the Bill, which he called "the basis of the whole bill." Id. at 474.38/ After noting his proposal to amend §1 by adding a preliminary phrase declaring that all persons of African descent shall be citizens of the United States, he stated that civil or natural liberty was the right of every citizen:

37/(...continued)

Id. (emphasis added). Senator Wilson agreed:

> [T]he amendment to the Constitution empowers us to pass the necessary legislation to make them free indeed; and the Senator [Trumbull] has a bill that is to follow this, and is to be passed I think, annulling these black codes and putting these people under the protection of just and equal laws.

Id. at 340 (Jan. 22, 1866)

38/The remaining sections contained "necessary machinery to give effect to what are declared to be the rights of all persons in the first section...." Id.

> ...I take it that any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution is prohibited.

Id. (emphasis added).

Senator Trumbull then considered Section 2 of the Bill. (See App. at 1). This section was part of the "machinery to carry [Section 1] into effect." Id. at 475 According to Trumbull, "A law is good for nothing without a penalty, without a sanction to it, and that is to be found in the other sections of the bill." Id.[12/] Thus, this section "merely punishes persons who violate what it is admitted that they ought not to

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[12/] The Court in the Civil Rights Cases, 109 U.S. 3 (1883), would describe §2 as "really the effective part of the law." Id. at 16. Its genesis is discussed in Screws v. United States, 325 U.S. 91 (1945), United States v. Classic, 313 U.S. 299 (1941); United States v. Williams, 341 U.S. 70 (1951).

violate." Id. at 605 (Feb. 2, 1866) (Sen. Trumbull).

The third section, Senator Trumbull described in part, as follows:

> The third section of the bill provides for giving to the courts of the United States jurisdiction over all persons committing offenses against the provisions of this act, and also over the cases of persons who are discriminated against by state law or customs.

Id. at 475 (emphasis added). Concluding his explanation, Senator Trumbull said:

> It may be assailed as drawing to the Federal Government powers that properly belong to the "States;" but I apprehend, rightly considered, it is not obnoxious to that objection. It will have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to color or race. It will have no operation in the State of Kentucky when her slave code and all her laws discriminating between persons on account of race or color shall be abolished.

Id. at 476. See also id. at 599-600 (Feb. 2, 1866); Id. at 602 (Sen. Lane); Id. at 603 (Sen. Wilson).

Just before the Senate voted on the measure, Senator Trumbull stated:

> Agreeing as I do... that all slave codes fall with slavery, that it is the duty of the States to wipe out all those laws which discriminate against persons who have been slaves, yet if they will not do it, and Congress has authority to do it under the Constitutional amendment, is it not incumbent on us to carry out that provision of the Constitution? That is all we propose to do.

Id. at 604. The bill carried 33 to 12. Id. at 606-607.

b. The Debates in the House of Representatives

The House debates following Senate passage reflect a similar purpose. Representative Wilson of Iowa, Chairman of the House Judiciary Committee declared "It will be observed that the entire structure of this bill rests on the discrimination relative to civil rights and immunities made by the States on 'account of race, color or previous condition of slavery.'" Id. at 1118 (March 1,

1866) (emphasis added). "[W]e may protect a citizen of the United States against a violation of his rights by the law of a single State." Id. at 1119.[60]

Representative Cook of Illinois added his voice:

> Now sir, I am prepared, for myself, to say that when those rights which are enumerated in this bill are denied to any class of men on account of race or color, when they are subject to a system of vagrant laws which sells them into slavery or involuntary servitude, which operates upon them as upon no other part of the community, they are not secured in the rights of freedom.
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[60] Later, Rep. Wilson would ask in debate:

> And if they are entitled, as citizens of the United States, to those rights, are they entitled to protection of those rights from the hands of Government? And should a State enact laws and attempt to enforce them which will deprive the citizens of the United States of those rights, may we not intervene to protect them in spite of those laws of the State?

Id. at App. 157 (March 8, 1866).

> Any combination of men in his neighborhood can prevent him from having any chance to support himself by his labor. They can pass a law that a man not supporting himself by labor shall be deemed a vagrant, and that a vagrant shall be sold.

Id. at 1124 (emphasis added)[41/]

Representative Thayer, making his point by the effective use of repetition, observed later the same day:

> Sir, if it is competent for the new-formed legislatures of the rebel states to enact laws which oppress this large class of people who are

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41/ Decrying such laws, and noting ruefully that there was no possibility that "these States will secure [the freedman] in those rights" specified in the bill and that the states had, "already spoken through their Legislatures" and produced acts which "have been set aside by [federal] military commanders," Rep. Cook announced:

> To my mind the conclusion is irresistible that the second section of [the Thirteenth] amendment of the Constitution... gives us the right to protect these men against precisely such a system of legislation as the one to which I have referred. If it does not it is worth nothing.

Id. (emphasis added).

> dependent for protection upon the United States Government, to retain them still in a state of real servitude; if it is practicable for these Legislatures to pass laws and enforce laws which reduce this class of people to the condition of bondmen; laws which prevent the enjoyment of the fundamental rights of citizenship; laws which declare for example, that they shall not have the privilege of purchasing a home for themselves and their families; laws which impair their ability to make contracts for labor in such manner as virtually to deprive them of the power of making such contracts, and [in] which they declare them vagrants because they have no homes and because they have no employment; I say, if it is competent for these Legislatures to pass and enforce such laws, then I demand to know, of what practical value is the amendment abolishing slavery in the United States?

Id. at 1151 (emphasis added); See id. at 1152, 1153 (referring to the "tyranny of laws" passed by the reconstructed legislature of a number of Southern States which would destroy the liberty of freedmen). See also id. at 1160 (Rep. Windom, Minn.) (pointing to the "wrongs ... inflicted upon the freedmen by

communities and states" under the black codes and the lack of protection received from civil authorities in their states).[62]

Rep. Shellabarger (Ohio), in the days just before the House vote on S.61, stated that the "whole effect" of Section 1

> is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distrections based on race or former condition in slavery.
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> [Section 1] secures - not to all citizens, but to all races as races who are citizens - equality of

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[62] Representative Raymond of New York, who would oppose the measure, added:

> And now, as to the particular bill which we are discussing. it is intended to secure these citizens against injustice that may be done them in the courts of the State within which they may reside. It is intended to prevent unequal legislation in those States affecting them injuriously. That is a high and proper object.

Id. at 1267 (March 8) (emphasis added).

protection in those enumerated civil rights which the States may deem proper to confer upon any races.

• • •

If the State may abridge or destroy the rights of citizenship which the United States confers and is bound to secure, and must even levy war to protect against the slightest outrage by a foreign government, then the United States is no nation....It must here be noted that, the violations in citizens' rights, which are reached and punished by this bill, are those which are inflicted under "color of law" & c. The bill does not reach mere private wrongs, but only those done under color of State authority; and that authority must be extended on account of the race or color. It is meant, therefore, not to usurp the powers of the States to punish offenses generally against the rights of citizens in the several States, but its whole force is expended in defeating an attempt, under State laws, to deprive races and the members thereof as such of the rights enumerated in this act. This is the whole of it.

Id. at 1293-1294 (March 9, 1866) (emphasis added).[42/]

[42/] Representative Shellabarger's comments appear to reflect an understanding evident elsewhere in the Congressional debates that the scope of Section 2 of the bill was coextensive with Section 1. Thus, in an exchange with Representative Loan on why the "color of law" limitation appears in Section 2, Representative Wilson explained: "That grows out of the fact that there is discrimination in reference to civil rights under the local laws of the States. Therefore we provide that the persons who under color of these local laws shall do these things shall be liable to this punishment." Id. at 1120 (March 1, 1866). Representative Loan understood this provision to apply only to "officers" of the state, and therefore inquired why the whole community, including "others than officers," should not be punished for committing wrongs under the statutes. Representative Wilson replied that Congress was not seeking to impose a general criminal code on the states and that in this bill it had, as Loan suggested, sought to eliminate the offensive state laws, but that "[a] law without a sanction is of very little force." Id.

Representative Kerr (Indiana) who opposed the measure, also viewed Sections 1 and 2 together: "Viewing [the second section] and the first section of the bill together", he said, "we learn that the proposed statute is both remedial and penal in its character. It proposes to protect certain rights and punish for the failure to protect them." Id. at 1270. (March 8, 1866).

Thus, the object of the Civil Rights Act was clear to the legislators as a vote drew near in the House.

c. The Draft of the Bingham Amendment To Provide a Civil Suit for Violators of the Act.

The Bingham Amendment to the motion to recommit the Civil Rights bill and Representative Wilson's response to the motion gives weighty support to the proposition that suits for private acts of discrimination were not contemplated by the 1866 Act. On March 9, Representative Bingham, who would vote against the Civil Rights Bill, moved to amend a motion to recommit the bill, to provide additional instructions. His amendment had two aspects. First:

> With instructions to strike out of the first section the words "and there shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States on account of race, color, or previous condition of slavery" and

> insert in the thirteenth line of the first section, after the word "right" the words "in every State and Territory of the United States.

Cong. Globe, 39th Cong., 1st Sess. 1271-1272 (March 9, 1866).

Second:

> Also to strike out all parts of said bill which are penal, and which authorize criminal proceedings, and in lieu thereof to give to all citizens injured by denial or violation of any of the other rights secured or protected by said act an action in the United States courts with double costs in all cases of recovery, without regard to the amount of damages: and also to secure to such persons the privilege of the writ of habeas corpus.

Id. at 1272.

The first proposal, after being rejected on motion, was ultimately adopted. The "no-discrimination" clause of §1 was deleted from the statute and the designated phrase was inserted. See id. at 1296 (March 9); id. at 1366 (March 13); id. at 1367 (March

13).[44/] The basis for Bingham's objection as to the no-discrimination clause, according to him, was that "there is scarcely a State in the Union which does not, by its constitution or state laws, make some discrimination on account of race or color between citizens of the United States in respect to civil rights." Id. at 1291 (March 9). To avoid any possible "lati-tudinarian construction not intended." Id. at 1367 (Rep. Wilson) (March 13),[45/] the change was agreed to.

However, the second proposal failed. Representative Bingham saw the criminal sanction of §2 as "the same thing" as a discrimination clause intended to have the force of law. Id. at 1291 (March 9). He denied "the power of Congress to make an error

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[44/] The phrase, "in every State and Territory of the United States," was added later.

[45/] For example, the possibility of suffrage.

of judgment in a State officer [by enforcing a discriminatory state provision] a crime to be punished by imprisonment." Id. Therefore, he sought to substitute a federal civil remedy for damages which would be available "to all citizens ... injured by denial or violation of any of the other rights secured or protected by said act...." Id. at 1292.

Representative Wilson attacked the proposal as no different in principle from Section 2 of the bill, and as an inadequate substitute for a criminal sanction. He argued:

> The amendment of the gentleman recognizes the principle involved, but it says that the citizen despoiled of his rights, instead of being properly protected by the Government, must press his own way through the courts and pay the bills attendant thereon. This may do for the rich, but to the poor, who need protection, it is mockery.... Under the amendment of the gentleman the citizen can only receive that protection in the form of a few dollars in the way of damages, if he shall be so fortunate as to recover a verdict against a solvent wrong-

> doer. This is called protection. This is what we are asked to do in the way of enforcing the bill of rights. Dollars are weighed against the right of life, liberty, and property. The verdict of a jury is to cover all wrongs and discharge the obligations of the Government to its citizens.
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> Sir, I cannot see the justice of that doctrine. I assert that it is the duty of the Government of the United States to provide proper protection, and to pay the costs attendant on it.

Id. at 1295 (March 9). Bingham's proposal floundered.

The rejection of the Bingham Amendment suggests that Congress never intended to authorize a federal civil action for private acts of discrimination.[44/] Even Rep. Bingham's broad proposal, which might have included civil suits, as well as suits against public officials, was viewed as

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[44/] See Mahone v. Waddle, 564 F.2d at 1037-1041, 1044-1049 (Garth, J. dissenting).

applying to state officials only, and on that basis was rejected.

The Civil Rights bill readily passed the House, but was vetoed by President Johnson. Id. at 1367 (March 15, 1866), 1679-1681 (March 27).

d. The Debates To Override In The Senate

The debates in the Senate following the veto continue to show that purely private acts of discrimination were not within the contemplation of the Congress which passed the Civil Rights Act.

Addressing the jurisdictional provisions of Section 3, Senator Trumbull said that the provision giving federal courts authority over cases "affecting persons" who were denied or could not enforce their Section 1 rights in state courts, were intended merely to provide supervisory roles for the district and circuit courts. Even if there was a

discriminatory custom in the community or hostile state legislation, which therefore was void under the federal law, the federal court would not be receptive to a case until such time as it became clear that the victim was unable to obtain relief, usually through a challenge from an adverse decision in state court. Thus, there is no provision included in the statute for a federal remedy for private discriminatory acts. Cong. Globe, 39th Cong., 1st Sess. 1757 (April 4). Further, Sen. Trumbull said, in words dispositive of the issue:

> This bill in no manner interferes with the municipal regulations of any State which protects all alike in their rights of person and property. It could have no operation in Massachusetts, New York, Illinois, or most of the United States of the Union.

Id. at 1761 (emphasis added). See also id. at 1785 (April 5) (Sen. Stewart). The override carried in the Senate by a vote of 33 to 15.

Id. at 1809 (April 6).

e. The Debates to Override in the House

The remarks of members of Congress in the House strongly support the Respondent's position here. Thus, Representative Lawrence said on April 7:

> The bill does not declare who should or shall not have the right to sue, give evidence, inherit, purchase, and sell property. These questions are left to the States to determine, subject only to the limitation that there are some inherent and undeniable rights, pertaining to every citizen, which cannot be abolished or by State constitution or laws.
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> It is worse than mockery to say that men may be clothed by the national authority with the character of citizens, yet may be stripped by State authority of the means by which citizens may exist.[47]

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[47] Representative Lawrence continued:

> Now, there are two ways in which a State may undertake to deprive citizens of these absolute, inherent, and inalienable rights: either by prohibitory laws, or by a failure to protect any one of them.

(continued...)

Cong. Globe, 39th Cong., 2d Sess. 1832-1833 (April 7).

Rep. Lawrence similarly continued:

> The whole question of the power of Congress to enact this bill is resolved into this: when the Constitution recognizes and secures rights which are denied by State laws, may Congress declare it a crime to execute or enforce constitutional laws, to deprive a citizen of a constitutional right?

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[47] (...continued)

> If the people of a State should become hostile to a large class of naturalized citizens and should enact laws to prohibit them and no other citizens from making contracts, from suing, from giving evidence, from inheriting, buying, holding, or selling property, or even from coming into the State, that would be prohibitory legislation. If the State should simply enact laws for native-born citizens and provide no law under which naturalized citizens could enjoy any of these rights, and should deny them all protection of civil process or penal enactments, that would be a denial of justice.

Id. (emphasis added); See also id. at 1835.

Id. at 1836.[41/]

The President's veto was overridden in the House by a margin of 122-41 and the Civil Rights Act became law. Id. at 1861 (April 9, 1866).

In light of this overwhelming, consistent view of the legislation Congress was enacting, the Court's current interpretation of §1981 cannot be supported. For if the guarantee of the right to make and

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[41/]Or, put another way by Representative Lawrence:

> [I]f a State, by her laws, says to whole classes of nature or naturalized citizen, "You shall not buy a house or a homestead to shelter your children within our borders;" "you shall be deprived of the means whereby life is preserved, whereby liberty is a book, and whereby property is held sacred" "you shall have no right to sue in our courts or make contracts" - in such cases, is the nation powerless to intervene in behalf of her own citizens, in behalf of humanity itself, to avert the annihilation of citizenship?.

Id. at 1835 (Rep. Lawrence).

enforce contracts and to buy and sell property were viewed as encompassing a prohibition on private discrimination, the legislative history would have been more dispositive of the Petitioner's contentions.

3. Petitioner's Contentions in Support of Jones are Unpersuasive.

a. The Schurz Report.

The arguments mustered by Petitioner in support of the Jones interpretation of the 1866 Civil Rights Act are not compelling. Her initial argument is that the problems which Congress intended to remedy were largely caused by private action (Pet. Br. at 15-40). She relies heavily upon the Report of General Carl Schurz,[42/] and to a lesser extent, those

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[42/]Report of C. Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 2 (1865).

of Generals O.O. Howard[20] and U.S. Grant,[21] and testimony before the Joint Committee on Reconstruction.[22]

The short answer to the argument based on the Schurz report was provided by Justice Harlan, dissenting in Jones:

> The Court also gives prominence [See 392 U.S. at 428-429] to a report by General Carl Schurz which described private as well as official discrimination against freedman in the South. However, it is apparent that the Senate regarded the report merely as background, and it figured relatively little in the debates. Moreover, to the extent that the described discrimination was the product of "custom," it would have been prohibited by the bill.

392 U.S. at 462 n. 28. Indeed, by the time the Schurz Report was finally released to the Senate on December 19, 1865 and Senator Sumner

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[20] Report of O.O. Howard, H.R. Exec. Doc. No. 11, 39th Cong., 1st Sess. 26 (1866)

[21] See Cong. Globe, 39th Cong., 1st Sess. 78.

[22] Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. (1866).

demanded that the entire Report be read aloud on the Floor (Pet. Br. at 17), Sumner's colleague from Massachusetts, Senator Wilson, had already introduced S.9, focusing the Senate's attention on recent black codes in Southern states, some still awaiting passage. Cong. Globe, 39th Cong., 1st Sess., 39 (Dec. 13, 1865). Wilson would renew his insistence that these black codes be annulled two days after the Schurz Report was introduced. Id. at 111 (Dec. 21). Thus, although S.9 did not pass, a basic legislative approach had already been formulated by the time the Schurz Report came out. See, SUPRA, at 64 n. 57. That Senator Trumbull, when he introduced the Civil Rights Act, made no mention of the Report -- but did emphasize the black codes -- further undermines Petitioner's argument. Cong.

Globe, 39th Cong., 1st Sess. 494 (Jan. 29, 1866); See, supra, at 62-68.[23]

b. The Joint Committee Report

Similarly, Petitioner's extensive reliance on the Joint Committee debates is unavailing (Pet. Br. at 27-40). Although she describes it at great length, only three specific references to the debates on the 1866 Act are offered. (Id. at 45 n. 48). The first, by Representative Raymond, was made in the context of his sardonic criticism of unreliable newspaper accounts being offered as evidence in Congressional argument; he stated he wanted to examine the testimony before the Joint Committee before deciding how to vote on

[23]The Howard and Grant Reports require even less attention (Pet. Br. at 25-27). Petitioner can summon up only one citation to the Civil Rights Act debates, a fleeting reference to the Grant Report. (Id. at 27). It cannot have had any significant impact on the legislation.

the bill. Cong. Globe, 39th Cong., 1st Sess. 1267 (March 8, 1866).[24]

The next record reference consists of excerpts from testimony and correspondence before the Committee which were inserted in the record by Rep. Lawrence as part of his remarks to override the Presidential veto. Id. at 1833-34 (April 7). This diffuse material, however, was employed to show the need for legislation where "a State, by her laws, says to whole classes of native or naturalized citizens -- you shall have no right to sue in our courts or make contracts ...." Id. at 1835.[25]

[24]Henry Jarvis Raymond was editor of the New York Times, as well as a Member of Congress. He did not vote on S.61 the first time it came up in the House; on the question whether to override President Johnson's veto, he voted against passage. Id. at 1367, 1861. (March 13, April 9).

[25]General Terry's testimony included specific references to fear of persecution of freedmen through the courts, as well as privately, and General Thomas alluded to his concern that, absent troops, freedmen

(continued...)

The remarks of Representative Clarke also fail to support Petitioner's contention. His statements do refer to testimony of "southern animus," but he emphasized the obnoxious black codes and vagrancy laws passed in Alabama, Mississippi, Kentucky and elsewhere. Id. at 1838-1839.

Reliance on an opponents' construction of proposed legislation is always risky business, and especially so in the case of Senator Garret Davis' comments. (Pet. Br. at 48-51). This unreconstructed Democrat was quick to wave the "bloody flag" of racial intermarriage and rape, and to utter dire warnings as to the scope of the bill. Cong. Globe, 1st Sess. 598 (Feb. 2), and App. 182-

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23/(...continued)
would be "thrown back into a condition of virtual slavery," being "compelled by legislative enactment to labor for little or no wages, and legislation would assume such form that they would not dare to leave their employers for fear of punishment ...." Id. at 1834, 1835.

183 (Apr.6). It does not appear that anyone paid him much notice. Nevertheless, Petitioner adverts to Representative Davis's alarm that the bill would apply to railroads, streetcars, hotels and certain other enterprises, as well as churches. (Br. at 49). Nowhere, however, does Davis indicate that it would give rise to a civil action for purely private discrimination. In any event, this does not appear to have been understood as the intent of the proponents.24/

24/The Cincinnati Commercial, a conservative Republican newspaper initially expressed fear that the bill would require the opening of "hotels, churches and theaters without distinction the basis of color." Cincinnati Commercial, March 30, 1866 at 4; Id., April 30, 1866 at 2 (column of "M___"). However, after being assured by proponents of the bill, including "influential members" of the Ohio delegation that the prohibitions would not apply to Ohio, but only to states with black codes, the Commercial abandoned its objection. Id., Apr. 16, 1866 at 4; Id. April 21, 1866 at 4. The Philadelphia North American expressed a similar view, that the bill would not apply to the "right" to "go to any car, coach, hotel, church [or] public place." Id., Apr. 10, 1866, at 2, c.1. Maltz, Reconstruction, supra, at 265.

(continued...)

Petitioner's argument that a comparison of the Freedman's Bureau Bill and Section 1 of the Civil Rights Act (Pet. Br. 51-54) does not require a conclusion that the latter was intended to address private action. A local official might well act out of personal prejudice not embodied in a community or governmentally-sanctioned custom.

Petitioner's remaining contentions criticizing Justice Harlan's reliance on certain quotations from members of the Thirty-Ninth Congress as inappropriate, or that his reading of them was wrong, are contextual in

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74/(...continued)

Moreover, the nature of the facilities described in Davis' remarks were public in character. Thus, in explaining H.R. 473, 42nd Cong., 2d Sess., during the debates on the Civil Rights Act of 1875, Rep. Lawrence described facilities run by inn-keepers, common carriers (whether by land or water), theaters and other places of public amusement, as "enumerated classes of public institutions created and protected for public purposes by authority of either common or statutory law, or both." Cong. Rec. (H)412 (43rd Cong., 1st Sess., 1874). Thus, it was well established that such locations were public in nature. See, supra, 54 n. 50.

nature. We believe the remarks quoted earlier lay to rest any doubt as to object of the Act. See, supra, at 60-65. It is unnecessary to deny the existence of private acts of discrimination to conclude that mainstream Republicans of this era were more interested in reconstructing state governments in order to resume their local responsibilities and to take their place in the Union without slavery, than in overwhelming the small federal court system with a deluge of civil lawsuits -- an inevitable consequence of Petitioner's position given the credence attached to the findings of Generals Schurz and Howard, and the Joint Committee.75/

75/Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), and Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861), do not aid Petitioner's argument (See Pet. Br. at 70-71). They denied the authority of the federal government to impose any legal obligation on a state judicial or executive officer to perform duties on behalf of the federal government. Concededly, Congress did not view this pre-war outgrowth of States rights and equal sovereignty doctrines as preventing it from (continued...)

POINT III

CONCERNS FOR *STARE DECISIS* SHOULD NOT PREVENT THE COURT FROM OVERRULING RUNYON

The conclusion that Runyon was incorrectly decided should impel this Court to reconsider and overrule it. Section 1981 was not intended to create a federal cause of

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22/(...continued)
imposing Section 3 criminal sanctions on state officers for violations of the Civil Rights Act. No reason appears why it should have balked at imposing civil liability on them, as well. In other words, once Congress repudiated this aspect of Prigg, there is no force to the suggestion that private acts of discrimination were the focus of the 1866 Act's civil remedies.

The intriguing issue raised by Prigg is whether the Act intended to create any federal civil action for its violation, even as against public officials. The drafters' construction of Section 3 certainly leaves open the possibility that it did not. See, supra, at 67-68. Criminal sanctions assured that no state officer would suffer liability unless his violation was established beyond a reasonable doubt. This would have had a moderating influence on efforts to invoke the statute against officials. The same inhibition would not exist in civil actions.

action for private acts of racial discrimination. If a federal cause of action is to be established, it is for Congress and not the Court to do so.

Stare decisis should not deter the Court from correcting its error. As we shall demonstrate, neither the doctrine nor the concerns which undergird it compel forebearance.

A. Perpetuation of the Rule in Runyon Would Breach the Separation of Powers Ordained By the Constitution.

Perpetuating an erroneous decision which creates a federal cause of action would be tantamount to legislation by the judicial branch. Sustaining Runyon would lead to this undesirable result.

The separation of powers is based on the idea that the power to make law is vested in the legislative branch, the power to execute law is vested in the executive branch,

and the power to interpret law is vested in the judicial branch. Field v. Clark, 143 U.S. 649, 692 (1892); Wayman v. Southard, 213 U.S. (10 Wheat) 1, 42 (1825). While the three branches of government cannot be hermetically sealed, Buckley v. Valeo, 424 U.S. 1, 121 (1976), the Court has "consistently ... emphasized that the federal lawmaking power is vested in the legislative, not the judicial branch of government...." Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 95 (1981). "[I]n carrying out that constitutional division...it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to...the judicial branch...." J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 405-406 (1928).

Here, that forbidden transfer is the natural consequence of upholding Runyon. Yet,

it is precisely what is urged upon the Court by the Members of Congress.[28] They assert:

> The interests of the amici would be adversely affected by the overruling of Runyon. The legislative effort necessary to restore this Court's original interpretation would likely be fractious and divisive, since corrective legislation would, in all likelihood, compel the Congress to address numerous peripheral questions concerning the scope and application of Section 1981.[29]

This statement is both ironic and disappointing. What is presented here is the spectacle of Members of Congress saying that they would be unable to enact any legislation

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[28] Brief of 66 Members of the United States Senate and 118 Members of the United States House of Representatives as Amici Curiae in Support of Petitioner. Since the brief was filed, additional members of the House of Representatives have joined in it.

We recognize, of course, that these Members participate here as individuals. Nevertheless, they constitute, respectively, approximately two-thirds of the membership of the Senate and nearly one-third of the membership of the House.

[29] Id. at 2.

today comparable to §1981. Any such bill, the legislators assert, would fall victim to intense and widespread controversy and the members of the two houses would become embroiled over "peripheral questions" with respect to the scope of the bill.

Because they fear failure, the Members argue that the Court should substitute itself for Congress and perform a legislative function by adhering to the previous mistaken reading of §1981. The matters about which the amici express concern -- open debate, the shaping of the bill and eventual time-consuming compromise -- are the very essence of a democratic legislative process. By what authority, however, would this Court be expected to perpetuate an erroneous decision "legislating" a cause of action which Congress could not pass? It cannot, by any found in the Constitution. Nor is any satisfactory basis suggested by the Members of Congress.

If Congress could not today pass §1981 as viewed in Runyon, the Court should not reenact it by judicial fiat.

The Members of Congress, therefore, unwittingly make a powerful argument for overruling Runyon. It may be more efficient for the Court to impose legislation by judicial fiat than for Congress to act; however, our system dictates otherwise. The duty to legislate is Congress' and not the Court's. The Framers of the Constitution intended that this be so.

As we discuss below, *stare decisis* does not require the Court to sacrifice respect for constitutional limitations or fidelity to historical intent in this case.

B. Flexibility Is Inherent In *Stare Decisis*

The Supreme Court has regularly overruled its decisions.[80/] Many of these instances involve statutory questions. One commentator has counted twenty-six cases between 1961 and 1987 explicitly overruling statutory precedents, twenty-four cases implicitly overruling such precedents and thirty-five cases in which the Court has disavowed significant reasoning in statutory precedents.[81/] Thus, rigid adherence to statutory precedent has not been a hallmark of the Court's jurisprudence.

Stare decisis et non quieta movere" - "the doctrine that teaches judges that it is

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[80/] The Constitution of the United States of America, Analysis and Interpretation, S. Doc. No. 16, 99th Cong., 1st Sess. at 2117-2127 (1989), as supplemented by 1986 Supp., S. Doc. No. 9, 100th Cong., 1st Sess. at 143 (1987). This compilation lists 184 cases through July 7, 1986. Id. at Supp. 143.

[81/] Eskridge, Overruling Statutory Precedents, 76 Geo. L.J. 1361, 1427-1438 (Tables A-C) (1988).

often wise to let sleeping dogs lie"[82/]--is not an unbending rule, but a guideline for decision making. It recognizes that the durability of judicial decisions interpreting legislation often rests upon their fidelity to the enactors' intent. As Justice Harlan stated in Monroe v. Pape, 365 U.S. 167 (1961), addressing the 1871 Ku Klux Klan Act:

> From my point of view, the policy of *stare decisis* as it should be applied in matters of statutory construction, and, to a lesser extent, the indications of Congressional acceptance of this Court's earlier interpretation, require that it appears beyond doubt from the legislative history of the ...statute that [the Court's earlier interpretations] misapprehended the meaning of the controlling provision, before a departure from

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[82/] J.P. Stevens, The Life Span of a Judge - Made Rule, 58 N.Y.U. L. Rev. 1 (1983). Justice Stevens quotes other, more literal translations. There is no suggestion that Justice Stevens had any particular decisions in mind in uttering his very free translation e.g., "'to stand by the decisions and not to disturb settled points,'" from Sprecher, The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied, 31 A.B.A.J. 301-02 (1945), Id. at n.1.

> what was decided in those cases would be justified.

Id. at 192 (footnote omitted) (concurring opinion). Moreover, the arguments need not be new ones; "[t]hat the flaws in an opinion were evident at the time it was handed down is hardly a reason for adhering to it." Thornburgh v. American College of Obstetricians, ___ U.S._____, 106 S. Ct. 2169, 2193 (1986) (White, J., dissenting).[83/]

However, Justice Harlan's test has been viewed only as "the most stringent test for the propriety of overruling a statutory decision," Monell v. Department of Social Services of the City of New York, 436 U.S.

[83/] That this observation pertained to whether a precedent "departs from a proper understanding" of the Constitution, id., does not make it any less applicable to the "issue raised in a statutory context", as framed by Justice Harlan. See Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528, 559 (1985).

658, 700 (1978)[84/]; Johnson v. Transportation Agency, Santa Clara Co., ___ U.S. ___, 107 S. Ct. 1442, 1474 (1987) (Scalia, J., dissenting); cf. Monell, supra, 436 U.S. at 718-19 (Rehnquist, J., dissenting) ("...one's only task is to discern the intent of the 42nd Congress")[85/]; Braden v. 30th Judicial Cir. Ct. of Kentucky, 410 U.S. 484, 502 (1973) (Rehnquist, J., dissenting).

Other articulations suggest that different concerns may also contribute to overruling precedent. In Boys Markets, Inc.

[84/] The Court in Monell noted that it had not expressly adopted Justice Harlan's test, id. at 700 n. 65, suggesting that a more relaxed standard might be available.

[85/] Even Justice Stevens, a strong advocate of *stare decisis*, has allowed that "[t]here may, of course, be situations in which a past error is sufficiently blatant 'to overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute.'" Commissioner v. Fink, ___ U.S. ___, 107 S. Ct. 2729, 2737 (1987) (Stevens, J., dissenting), citing Square D Co. v. Niagara Frontier Tariff Bureau, ___ U.S. _____, 106 S. Ct. 1922, 1930 (1986).

v. Retail Clerk's Union, Local 770, 398 U.S. 235 (1970), the Court illustrates this by quoting from an earlier decision:

> *[S]tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

Id. at 242, quoting Helvering v. Hallock, 309 U.S. 106, 119 (1939) (per Frankfurter, J.). And in Baldwin v. State of New York, 399 U.S. 117 (1970), Justice Harlan observed:

> The principle of *stare decisis* is multifaceted. It is a solid foundation for our legal system; yet care must be taken not to use it to create an unmovable structure.... Woodenly applied...it builds a stockade of precedent that confines the law by rules, ill-conceived when promulgated, or if sound in origin, unadaptable to present circumstances. No precedent is sacrosanct and one should not hesitate to vote to overturn this Court's previous holdings - old or recent - or reconsidered settled dicta where the principles announced prove either practically...or

> jurisprudentially ...unworkable, or no longer suited to contemporary life.

Id. at 127-128 (Harlan, J., concurring and dissenting) (citations omitted).

Justice Douglas also endorsed a flexible approach to *stare decisis*:

> It is, I think, a healthy practice (too infrequently followed) for a court to reexamine its own doctrine. Legislative correction of judicial errors is often difficult to effect. Moreover, responsible government shall entail the undoing of wrongs committed in the department in question. That course is faithful to democratic traditions. Respect for any tribunal is increased if it stands ready (save where injustice to intervening rights would occur) not only to correct the errors of others but also to confess its own.

Douglas, Stare Decisis, 49 Col. L. Rev. 735, 746-47 (1949).

In the field of civil rights, this flexibility has been noticeable too. In Greenwood v. Peacock, 384 U.S. 808 (1966), for example, the Court made clear in a case construing 28 U.S.C. §1443, that it would not

follow *stare decisis* out of blind adherence, but determine after "independent consideration" of disputed precedents whether to sustain or overrule them. As Justice Scalia has noted, "this Court has applied the doctrine of *stare decisis* to civil rights laws less vigorously than to other laws." Johnson v. Transportation Agency, 107 S. Ct. at 1473 (dissenting opinion), citing Maine v. Thiboutot, 448 U.S. at 33 (1980) (Powell, J., dissenting); Monroe v. Pape, 365 U.S. at 221-222 (Frankfurter, J., dissenting in part). This flexibility should not be diminished because the doctrine's application here may serve to restrict liability, rather than to expand it. Patterson v. McLean Credit Union, ___ U.S. ___, 108 S.Ct. ____ 56 U.S. L.W. 3735 (April 25, 1988) (per curiam) (ordering reargument).

C. This Case Calls For Application Of A Flexible Approach To Stare Decisis.

The present case, especially, calls for a cautious regard for precedent. That the Court should recently discover that §1981 authorized suits for private acts of discrimination, "a fact that [the Court's] decisions had kept a closely guarded secret for more than a century,"[86] must itself raise serious doubt. The Court early and consistently interpreted the Civil Rights Act of 1866, the Fourteenth Amendment as addressing state laws and conduct which imposed disabilities on blacks and deprived them of equal treatment in legal proceedings and punishments, rather than purely private acts by individuals.[87] (dictum).

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[86] 18 Moore's Fed. Prac. para. 0.402 [5] n.5 (1988).

[87] Bylew v. United States, 80 U.S. (13 Wall.) 581, 593, 596-597 (1871) (majority and dissenting opinions); Slaughter-House Cases, 83 U.S. (16 Wall) 36, 81 (1873); United States v. Cruikshank, 92 U.S. 542, (continued...)

Later decisions continued to support the proposition that purely private conduct could not be actionable under §1981. 88/

Nevertheless, Congress did not act. No legislation was passed making §1981 applicable to purely private conduct. The decision in Jones, therefore, represented an abrupt departure from what had been accepted

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87/(...continued)
554 (1876); Strauder v. West Virginia., 100 U.S. 303, 311-312 (1880); United States v. Harris, 106 U.S. 629, 642-644 (1882); and, of course, The Civil Rights Cases, 109 U.S. 3, 25-26 (1883) ("[The 1866 Act] is clearly corrective in character, intended to counteract and furnish redress against state laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified. Id. at 25.).

88/See Yick Wo v. Hopkins, 118 U.S. 356, 369-370 (1886); Hodges v. United States, 203 U.S. 1 (1906), overruled, Jones, supra, at 441-443 n.78; cf. Corrigan v. Buckley, 271 U.S. 323, 524 (Rev. Stat §1978). Hurd v. Hodge, 334 U.S. 24 (1948)(§1982).

as the reach of the statute.89/ Its entitlement to adherence is diminished in these circumstances. "'[I]f changes [were] to be made in the long-settled interpretation of the provisions of this century-old ... statute, it [was] for Congress and not this Court to make them.'" Johnson v. Mississippi, 421 U.S. 213, 227 (1975), quoting City of Greenwood v. Peacock, 384 U.S. 808, 834 (1966). Cf. Monell, supra, 436 U.S. at 695-696 (*stare decisis* no bar to correction of earlier decision's departure from longstanding prior practice); Johnson v. Transportation Agency, supra, 107 S.Ct. at 1473 (Scalia, J., dissenting).

89/The "under color" requirement of §2 of the Civil Rights Act and Revised Statutes §1979 (presently 42 U.S.C. §1983) had evolved to permit the inclusion of private persons, but to come within the statute, they had to be jointly engaged with state officials in prohibited conduct. United States v. Price, 383 U.S. 787, 795 (1966).

Moreover, despite its holding in Runyon, the Court has refused to analogize a violation of §1981 to a suit for interference with contractual rights for purposes of selecting an appropriate state statute of limitations, finding that "[t]he provision asserts, in effect, that competence and capacity to contract shall not depend upon race." Goodman v. Lukens Steel Co., ____U.S.___, 107 S.Ct. 2617, 2621 (1987)

Competence and capacity to contract are conferred by law or deprived by law; purely private acts cannot affect them. If that is what §1981 stands for, Runyon and Jones cannot be right.

Similarly, the bedrock rationale of the intent requirement of General Building Contractors Assoc., Inc. v. Pennsylvania, 458 U.S. 375 (1982), that in §1981,

> Congress acted ... to protect the freedom from intentional discrimination by those whose object was "to make their former slaves

> dependent serfs, victims of unjust laws, and debarred from all progress and elevation by organized social prejudices.",

458 U.S. at 388,[90] and that, according to the supporters, "the legislation was designed to eradicate blatant deprivations of civil rights[91], clearly fashioned with the purpose of oppressing the former slaves," id., again point to a larger, more systemic and forceful object than mere private acts of discrimination, even those performed intentionally. They point to laws, state actions, and actions taken under color of law or custom.

The Court's decisions following Runyon, therefore, neither fully nor easily

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[90] Quoting Cong. Globe, 39th Cong., 1st Sess. 1839 (1866)(Rep. Clarke). Id.

[91] The term "civil rights" is defined as the drafters employed it. Cf. St. Francis College v. Al-Khazraji, ___ U.S. ___, 107 S.Ct. 2022, 2026-2027 (1987) (discussing the term "race" as used in §1981).

accept its rationale.

D. The Principal Concern of *Stare Decisis* Would Be Preserved Despite The Overruling of Runyon.

"[O]ften considered the mainstay of *stare decisis*," is the "desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise." Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970). Here, the absence of Runyon would not materially affect this concern.

Patently, the law can offer no guide or plan for prospective plaintiffs -- the discriminatees in civil rights cases under §1981. Unlike the regulation of securities, taxes or business affairs, §1981 is remedial, not regulatory, in its application. It is concerned with remedying an injury to the individual rights of a person. Goodman v.

Lukens Steel Co., 107 S.Ct. at 2621. "This is not an area of commercial law in which, presumably, individuals have arranged their affairs in reliance on the expectant stability of decision." Monroe v. Pape, 365 U.S. at 221-222 (Frankfurter, J. dissenting in point).[92] Therefore, reliance interests would not be materially affected by overruling Runyon.

Furthermore, the large majority of cases brought under §1981 appear to be duplicative of Title VII claims,[93] or similar claims that could be brought under state fair employment practice laws.[94] These modern

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[92] See, e.g., N.L.R.B. v. International Longshoremen's Ass'n, ___ U.S. ___, 105 S.Ct. 3045, 3058 (1985) ("In the meantime, management and labor alike have relied on the work-preservation doctrine to guide their bargaining.")

[93] The Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. (1981).

[94] Eisenberg and Schwab, The Importance of Section 1981, 73 Corn. L. Rev. 596 (1988). Based on statistics drawn from three judicial districts in FY

(continued...)

civil rights statutes, which explicitly address employment and other forms of private discrimination and which empower administrative agencies to interpret, administer and often adjudicate disputes under the laws, are far more influential in molding behavior of the public than §1981 which is general in its terms and must depend upon a lawsuit for enforcement.[95]

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[94](...continued)
1980-1981, the authors conclude that "[e]mployment claims comprise [over] 77% of all filings under the statute." Id.

[95]See Brief, Amici Curiae, of the State of New York, et al., [hereinafter "State Attorneys General"] at 20-21 nn. 42-43.

In FY 1984, the last year for which an annual report has been published, the federal Equal Employment Opportunity Commission and FEP agencies under contract with the Commission received 76,198 charges of racial discrimination against private employers. E.E.O.C., 19 Ann. Rep. 22 (1987). In addition, they received 320 charges based on "color" and 14, 184 charges based on national origin, against private employers, id., some of which, at least, might also have constituted claims of racial discrimination under St. Francis College, 107 S.Ct. at 2029 (Brennan, J., concurring).

Although St. Francis College interpreted "race" broadly, the Fifth Circuit has refused to extend Ruynon
(continued...)

Title VII is broader than §1981, even in terms of racial discrimination. See Johnson v. Railway Express Agency, Inc., 421 U.S. at 459 (noting "Title VII's [broad] range and its design as a comprehensive solution for the problem of invidious discrimination in employment....") It is not surprising, therefore, that Justice Blackmun should have recognized here that "it is probably true that most racial discrimination in the employment context will continue to be redressable under other statutes." 108 S. Ct. at 1422 (dissenting opinion). There is "substantial overlap" between §1981 and Title VII.[96] Id.

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[95](...continued)
to alleged discrimination based on alienage. Bhandari, supra.

[96]Unless a violation of §1981 can be made out on grounds different from those under Title VII, the Fifth Circuit bars the consideration of §1981 claims. Watson v. Fort Worth Bank & Trust, 798 F.2d 790 at 794 n.4 (5th Cir. 1986) cert. granted, ___ U.S. ___, 107 S.Ct. 3227 (1987) (No. 86-6139). The State Attorneys General point to the fact that Title VII covers only employers with
(continued...)

(Stevens, J., dissenting). Indeed, in their brief, the State Attorneys General concede that "courts fashioning equitable remedies under §1981 can require relief similar to that available under Title VII, such as hiring, promotion, reinstatement, retroactive seniority and affirmative action...."[27] -- the very stuff of corrective measures in redress of grievances.

Outside the employment area, other constitutional and statutory grant appropriate

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26/(...continued)
fifteen or more employees, and that most state statutes have jurisdictional limits which "approach" that of Title VII (Br. at 20-21). It is noted, however, that the New York State Human Rights Law covers all employers with four or more employees (New York Executive Law, §290 et seq.). Id. at 21 n.43, and in the District of Columbia, D.C. Code Ann. §§-2501, et seq. the law covers all employers with one or more employees. In fact, only 11 states have the same jurisdictional limit as the EEOC; the remainder with fair employment practice laws have an average threshold which is considerably lower. 81 Lab. Rel. Rep. (BNA) 451:105-107 (1987).

27/Brief, State Attorneys General, at 20.

of other laws, most notably Titles II and VII of the Civil Rights Act of 1964 (U.S.C. §2000a, et seq; 42 U.S.C. §2000e, et seq.) and the Fair Housing Act of 1968 (42 U.S.C. 3601, et seq.) are even broader than §1981. Section 1981 is limited to discrimination based on race. Any victims of other invidious forms of discrimination, sex, age, religion, marital status, national origin, handicap and the like, must look elsewhere for relief. Bhandari v. First National Bank of Commerce, 829 F.2d 1343 (5th Cir. 1987).

Accordingly, even if §1981 were to be restricted, little change would be expected in conduct presently affected by the statute. Modern anti-discrimination statutes specially designated for this purpose would continue to

guide private actions and, more broadly, public attitudes.[25/]

Raymond Gonzalez, the co-plaintiff in Runyon, was recently interviewed with respect to the reconsideration of that case by this Court and the possibility of a return of §1981 to its original intent. He said:

> "Barriers were being broken down very, very fast in those days [1976]," Gonzalez says, adding, "the impact on our family was no where as great as it was for those in the Brown case."

[25/] One author notes:

> At the time Title VII was enacted, approximately one-half of the 50 states had fair employment statutes. 110 Cong. Rec.7205 (1964) (remarks of Sen. Clark). Today 49 States - all but Alabama - have some form of fair employment statute.

Catania, State Employment Discrimination Remedies and Pendent Jurisdiction Under Title VII: Access to Federal Courts, 32 Am. L. Rev. 777, 782 n.24 (1983). Similarly, "[i]n some cases, state statutes apply to a broader range of discriminatory acts than are covered by Title VII, or provide a wider range of possible remedies, including recovery of compensatory damages." Wald, Alternatives to Title VII: State Statutory And Common-Law Remedies For Employment Discrimination, 5 Harv. Women's L. J. 35, 42 (1982) (footnotes omitted).

> As for the Court's decision overturning the victory he won for his son, Gonzalez is not bothered by the legal debate. He feels the country has changed too much for such ruling to matter greatly.
>
> "Whites are not going to run out and open up schools that will keep out blacks," Gonzalez says. "The population is a lot more enlightened now."

Legal Times of Washington, Vol. XI, No. 2, June 6, 1988.

E. Congressional Actions Regarding §1981 Do Not Prevent The Overruling Of Runyon.

Petitioner argues that Congress has "adopted" the principle that §1981 prohibits private racial discrimination. (Pet. Br. at 71-100). This argument is unsound. Congress' failure to legislate in this area is inconclusive. As stated by Justice Scalia in Johnson v. Transportation Agency, Santa Clara County, supra:

> This assumption, which frequently haunts our opinions, should be put to rest. It is based, to begin with, on the patently false premise

> that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant.

Id. at 1473 (dissenting opinion). The failure of Congress to enact legislation can result from a variety of reasons, including:

> (1) approval of the status quo, (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.

Id.; Accord, United States v. Stauffer Chemical Co. 684 F.2d 1174, 1184 (6th Cir. 1982).

Here, Congress' actions with respect to certain civil rights legislation do not support Petitioner's argument. See Girouard v. United States, 328 U.S. 61 (1946); Boys Markets, Inc, supra. At most Congress did not wish to tamper with the remedial provisions of Title VII. As this Court has noted: "[U]nsuccessful attempts at legislation are

not the best of guides to legislative intent." Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381 n.11 (1969). See also Bryant v. Yellen, 447 U.S. 352, 376 (1980); Bob Jones University v. United States, 461 U.S. 574, 600 (1982); City of New Milwaukee v. Illinois and Michigan, 451 U.S. 304 , 332 n. 24 (1981). In any event, the views of one Congress in interpreting the legislation of another, much earlier Congress is entitled to very little weight. Russello v. United States, 464 U.S. 16, 25 (1983); Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories, 460 U.S. 150, 165 n. 27 (1983); Consumer Product Safety Com'n. v. GTE Sylvania, Inc., 497 U.S. 102, 118 (1980); International Bro. of Teamsters v. United States, 431 U.S. 324, 354 n. 39 (1977);

United States v. Price, 361 U.S. 304, 313 (1960).[99/]

Petitioner's argument concerning the passage of the Civil Rights Attorney's Fees Award Act of 1976 is equally unpersuasive. As the legislative history of that statute clearly demonstrates, the act's main purpose

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[99/] Indeed, the Tower Amendment in 1964 did not address an individual's ability to seek redress for purely private acts of discriminations. Rather, it sought to "preclude the harassment of businessmen, companies, or unions by more than one Federal agency." Legislative History of Title VII of the Civil Rights of 1964, at 3324. See 110 Cong. Rec. 13650-13652 (1964).

Similarly, the pre-Runyon rejection of the Hruska Amendment in 1972 did not involve an examination of the validity of the §1981 cause of action as applied to private acts of discrimination, and Congress did not alter Title VII as a result. See 110 Cong. Rec. (S) 3172, 3368-3373 (1972). What is more interesting, perhaps, is that the question of §1981 remedies in the context of the proposed extension of Title VII to cover state and local government employees. H. R. Rep. No. 238, 92d Cong., 1st Sess., (1971). In that context, it would not have been directed at private acts of discrimination at all. Indeed, Senator Williams, in opposing the Hruska amendment, was under the gross misapprehension that the 1866 Civil Rights Act had "guided this country for a century...." Id.

was to provide for an award of attorney's fees in cases brought under all the civil rights statutes. Congress was not concerned with the scope of §1981, or any other civil rights law.[100/] Thus, upon close analysis, Petitioner's claim of Congressional acquiescence in the Runyon decision fails.

[100/] The Civil Rights Attorney's Fees Award Act of 1976, P.L. 94-559, 42 U.S.C. §1988, upon which Petitioner also relied (Pet. Br. 91-95), does not support her position, either. It sought only to "remedy anomalous gaps in our civil rights laws" created by the Court's decision in Alyeska Pipeline Service Co. v. Wildness Society, 421 U.S. 240 (1975), and to achieve consistency in our civil rights laws," by authorizing "the familiar remedy of reasonable counsel fees to prevailing parties" in civil rights actions. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 1, 2 (1976). It applies not only to §1981, but to §§1978-1981 of the Revised Statutes (42 U.S.C. §§1982-1986) and 42 U.S.C. §2000d (discrimination in federally assisted program) and 20 U.S.C. §§1681-1686 (International Revenue Code). Congress did not address the merits or scope of any of these provisions; the law was to continue changed. 122 Cong. Rec. (H) 35122 (1976) (Rep. Duran). Indeed, "It [was] not the intent of Congress nor [was] it the intent of this statute to encourage persons to sue directly under section 1981 rather than using the services of the [EEOC] under Title VII of the Civil Rights Act." 122 Cong. Rec. (H) 35124 (1976) (Rep. Railsback). A "quick fix" to achieve "consistency" was the entire object.

F. Asserted Reliance Interests Do Not Require Adherence To Ruynon.

Although Petitioner contends that Jones and Runyon have engendered "widespread reliance" supporting their reaffirmation. (Pet. Br. 102-106), this assertion must be met with skepticism. Any "reliance" is principally a function of the availability of relief. As the Court stated in Bhandari v. First National Bank of Commerce, supra:

> For us, of course, there is no question whether to adhere or not to Jones and McCrary; they are part of our marching orders, mandates which we can either obey or seek other work.

829 F.2d at 1349.

The states can pass their own legislation, as several have.[101/] That

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101/ Brief of the States of New York, et al., Amici Curiae, at 19 n. 36. The States assert that they have the power to enact legislation modeled after §1981 as construed in Runyon, but maintain that "the period during which legislatures were acting to do so and administrative agencies were re-tooling to entertain new kinds of changes would certainly be one of confusion or chaos." Id. at 21. Since many states already regulate (continued...)

attorneys may have relied on the availability of such relief seems the weakest argument of all. That attorneys should advise their clients to forego Title VII or state law remedies specifically created to remedy racial discrimination in the hope of attaining greater damages in a §1981 suit is not a reason for sustaining Runyon.

G. Runyon Should Be Overruled To Maintain Public Faith In the Judiciary.

Public faith in the Court depends upon the Court's integrity. It must interpret statutes with fidelity to the intent of Congress which passed them. If it does not, principled decision-making suffers and the legislative will be violated.

"Wisdom too often never comes, and so one ought not to reject it merely because

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101/ (...continued) the subjects covered by the Runyon view of §1981, particularly employment, the argument appears to be overstated.

it comes late." Hensler v. Union Planters Bank, 335 U.S. 595, 600 (Frankfurter, J., dissenting), quoted in Boys Markets, Inc. v. Retail Clerk's Union, Local 770, supra, 398 U.S. at 255 (Stewart, J., concurring). That it follows an earlier contrary interpretation may be unfortunate, but it offers no justification for perpetuating a clear mistake misapprehending the meaning of the statutes. Cloaking this error in *stare decisis* does serve to promote respect for the Court.

On the other hand, overruling Runyon will permit Congress and state legislatures to consider whether and where additional civil rights protection may be needed (as Congress has been doing this year)[102/] without

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[102/] See proposed Fair Housing Amendments Act of 1988; H.R. 1158. Congress has previously enacted the Immigration Reform and Control Act of 1986, covering certain employment related discrimination based on alienage and national origin. IRCA §102, 8 USC §1342b (Supp. IV 1986).

endangering the policies of existing statutory schemes or burdening the courts with multi-court litigation.

CONCLUSION

For the reasons stated, the Court should reconsider and overrule the holding in Runyon that §1981 prohibits purely private act of discrimination on the basis of race.

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APPENDICES

(1)

THE CIVIL RIGHTS ACT OF 1866.
ACT OF APRIL 9, 1866
CH. 31, 14 STAT. 27 (1866)

April 9, 1866 CHAP. XXXI -An Act to protect all persons in the United States in their Civil Rights, and furnish the Means of their Vindication.

Who are citizens of the United States.

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law statute, ordinance, regulation, or custom to the contrary notwithstanding.

their rights and obligations.

Penalty for depriving any person of any right protected by this act, by reason of color or race, &c.

SEC. 2. *And be it further enacted*, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Courts of the United States to have jurisdiction of offenses under this act.

SEC. 3. *And be it further enacted*, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this act, and

also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in

Suits commenced in State courts may be removed on defendant's motion.

1863, ch. 90. Vol. xiii, p. 507

1863, ch. 87. Vol. xii. p. 735.

Jurisdiction to be enforced according to the laws of the United States, or the common law, &c.

civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the courts having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

District Attorneys, &c., to institute proceedings against all violating this act.

Sec. 4. *And be it further enacted*, That the district attorneys, marshals, and deputy marshals of the United States, the commissioners appointed by the circuit and territorial courts of the United States, with powers of arresting, imprisoning, or bailing offenders against the laws of the United States, the officers and agents of the Freedmen's

Bureau, and every other officer who may be specially empowered by the President of the United States, shall be, and they are hereby, specially authorized and required, at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act, and cause him or them to be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States or territorial court as by this act has cognizance of the offence. And with a view to affording reasonable protection to all persons in their constitutional rights of equality before the law, without distinction of race or color, or previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, and to the prompt discharge of the duties of this act, it shall be the duty of the circuit courts of the United States and the superior courts of the Territories of the United States, from time to time, to increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with a violation of this act; and such commissioners are hereby authorized and required to

Number of commissioners appointed by circuit and territorial courts to be increased; their authority.

exercise and discharge all the powers and duties conferred on them by this act, and the same duties with regard to offences created by this act, as they are authorized by law to exercise with regard to other offences against the laws of the United States.

Marshals, &c., to obey all precepts under this act. Penalty for refusal, &c.

SEC. 5. *And be it further enacted*, That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant or other process when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of the person upon whom the whom the accused is alleged to have committed the offence.

Commissioners may appoint persons to execute warrants.

And the better to enable the said commissioner to execute their duties faithfully and efficiently, in conformity with the Constitution of the United States and the requirements of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing, under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other

process as may be issued by them in the lawful performance of their respective duties; and the persons so appointed to execute any warrant or process

Authority of such persons.

as aforesaid shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or the militia, as may be necessary to the performance of the duty with which they are charged, and to insure a faithful observance of the clause of the Constitution which prohibits slavery, in conformity with the provisions of this act; and said warrants

Warrants to run where.

shall run and be executed by said officers anywhere in the State or Territory within which they are issued.

Penalty for obstructing process under this act.

SEC. 6. *And be it further enacted*, That any person who shall knowingly and wilfully obstruct, hinder, or prevent any officer, or other person any warrant or process issued under the provision of this act, or charged with the execution of any person or persons lawfully assisting him or them, from arresting any person for whose apprehension such warrant or process may have been issued, or shall rescue or attempt to rescue

for rescue, &c;

such person from the custody of the officer, other person or persons, or those lawfully

assisting as aforesaid, when so arrested pursuant to the authority herein given and declared, or shall aid, abet, or assist any for aiding to escape; person so arrested as aforesaid, directly or indirectly, to escape from the custody of the officer or other person legally authorized as aforesaid, or shall harbor or

for harboring, &c.

conceal any person for whose arrest a warrant or process shall have been issued as aforesaid, so as to prevent his discovery and arrest after notice or knowledge of the fact that a warrant has been issued for the apprehension of such person, shall, for either of said offences, be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, by indictment and conviction before the district court of the United States for the district in which said offences may have been committed, or before the proper Court of criminal jurisdiction, if committed within any one of the organized Territories of the United States.

Fees of district attorneys, marshals, clerks, commissioners, &c;

Sec. 7. *And be it further enacted,* That the district attorneys, the marshals, their deputies, and the clerks of the said district and territorial courts shall be paid for their services the like fees as may be allowed to them for similar

services in other cases; and in all cases where the proceedings are before a commissioner, he shall be entitled to a fee of ten dollars in full for his services in each case, inclusive of all services incident to such arrest and examination. The person or persons authorized to execute the process to be issued by such commissioners for the arrest of offenders against the provisions of this act shall be entitled to a fee of five dollars for each person he or they may arrest and take before any such commissioner as aforesaid, with such other fees as may be deemed reasonable by such commissioner for such other additional services as may be necessarily performed by him or them, such as attending at the examination, keeping the prisoner in custody, and providing him with food and lodging during his detention, and until the final determination of such commissioner, and in general for performing such other duties as may be required in the premises; such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper

to be paid from the treasury of the United States, and to be recoverable from defendant when convicted.

district or county, as near as may be practicable, and paid out of the Treasury of the United States on the certificate of the judge of the district within which the arrest is made, and to be recoverable from the defendant as part of the judgment in case of conviction.

President may direct the judge, &c., to attend, &c., for the more speedy trial of persons charged with violating this act;

SEC. 8. *And be it further enacted*, That whatever the President of the United States shall have reason to believe that offences have been or are likely to be committed against the provisions of this act within any judicial district, it shall be lawful for him, in his discretion, direct the judge, marshal, and district attorney of such district to attend at such place within the district, and for such time as he may designate, for the purpose of the more speedy arrest and trial of persons charged with a violation of this act; and it shall be the duty of every judge or other officer, when any such requisition shall be received by him, to attend at the place and for the time therein designated.

may enforce the act with the military and naval power.

SEC. 9. *And be it further enacted*, That it shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and enforce the due execution of this act.

Appeal to the supreme court of the United States.

SEC. 10. *And be it further enacted*, That upon all questions of law arising in any cause under the provisions of this act a final appeal may be taken to the Supreme Court of the United States.

(2)

ENFORCEMENT ACT OF 1870,
CH. 114, 16 STAT. 140-46

An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes.

* * *

SECTION 16. *And be it further enacted*, That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void.

SECTION 17. *And be it further enacted*, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens,

shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

SECTION 18. *And be it further enacted*, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

(3)

TITLE XXIV
CIVIL RIGHTS

REVISED STATUTES OF THE UNITED STATES
PASSED AT THE FIRST SESSION OF THE FOURTY-THIRD CONGRESS, 1873-'74

Equal rights under the law.

31 May, 1870, c. 114, s. 16, v. 16, p. 144.

SEC. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceeding for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
[See (858)]

Rights of citizens in respect to real and personal property.

9 April, 1866, c. 31, s. 1, v. 14, p.27.

SEC. 1978. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Civil action for deprivation of rights.

20 April, 1871, c. 22, s. 1, v. 17, p. 13.

SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. [See ((363-629.]

(4) §1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue, be praties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exaction of every kind and to no other.

(5) §1982. Property rights of citizens

All citizens of the United States shall have the same right,in every State and Territority, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. R.S.§1978.